Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors (including Can-One International Sdn Bhd as 15th respondent) and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–2041 OF 2009, W-02–2042 OF 2009, W-02–2043 OF 2009, W-02–2044 OF 2009, W-02–2503 OF 2009, W-02–2198 OF 2009, W-02–2199 OF 2009 AND W-02–2200 OF 2009

ABDUL MALIK ISHAK, JEFFREY TAN AND TEE AH SING JJCA
24 JUNE 2010

Companies and Corporations — Liquidators — Directions, applied for — Whether liquidators ought to proceed with completion of sale of shares — Whether decision giving directions to liquidator could be appealed against

Companies and Corporations — Liquidators — Duties, breach of — Whether liquidators were in breach of fiduciary duties owed to contributories of company — Whether there was conflict of interest — Whether liquidators acted in conflict of interest for their own benefit and for benefit of existing clients when they continued to receive financial remuneration from clients

Companies and Corporations — Shares — Sale of shares — Open public tender — Whether there was valid offer from Can-One International Sdn Bhd (Can-One) to purchase shares — Whether Can-One complied with terms and conditions or procedures stipulated by liquidators in public tender exercise

The instant judgment is in respect of eight appeals which arose from five inter-related applications, and which applications can be broadly divided into two categories, namely, leave applications and applications for directions. The applications arose after Kian Joo Holdings Sdn Bhd ('the company') was wound up by the High Court on 30 January 1996. Two individuals in their capacity as partners of KPMG Peat Marwick were appointed as the liquidators of the company. The company was at all material times the single largest shareholder of Kian Joo Can Factory Bhd ('KJCFB'), holding ordinary shares representing 34.63% of the issued share capital of KJCFB. On 10 July 2008, the liquidators called for a contributories meeting for the purpose of ascertaining the wishes of the latter regarding the disposal of the KJCFB shares in the liquidators' possession. At the contributories meeting the majority contributories voted in favour of the sale of the entire KJCFB shares while the minority contributories preferred distribution of the KJCFB shares in specie. On 30 July 2008, the liquidators decided to exercise their powers and sell the

KJCFB shares by way of an open public tender. The liquidators then proceeded to set out the terms and procedures to be followed by the bidders in submitting their offers for the purchase of the KJCFB shares. One of the fundamental terms of the open public tender exercise was that the bidders should include details of the sources of funding to complete the transaction. At the end of the open public tender exercise and on the revised deadline extended by the liquidators to 27 November 2008, three bids were received by the liquidators and they were from Can-One International Sdn Bhd ('Can-One'), Golden Pomelo Sdn Bhd ('Golden Pomelo') and another. On 23 February 2009 the liquidators accepted Can-One's conditional offer to purchase 32.9% of the entire issued and paid up share capital of KJCFB and thereafter entered into a conditional share sales agreement with Can-One. However, at an informal contributories meeting of the company held on 30 March 2009, all the contributories present voted against the completion of the sale of the KJCFB shares to Can-One. At the contributories meeting called by the liquidators on 30 April 2009, the contributories unanimously opposed the sale of the KJCFB shares to Can-One, and rebuked the liquidators for their acts in breach of their fiduciary duties, conflict of interests as well as fraud in regard to the tender process for the sale of the KJCFB shares. It was the contributories argument that Can-One did not have any financing available for the purchase of the KJCFB shares and that they ought to have been disqualified for not complying with the terms and conditions of the public tender exercise. The majority contributories led by Dato' See Teow Chuan then proceeded by way of a notice of motion for leave to proceed with legal action against the liquidators and Can-One for damages while the minority contributories sought for an order to strike out the leave application. The liquidators on the other hand filed an application seeking directions as to whether to proceed with the completion of the sale of KJCFB shares to Can-One pursuant to the terms of the shares sale agreement it had entered into with Can-One. At the same time Gold Pomelo, the unsuccessful bidder, filed an application to intervene in the proceedings and also sought for, inter alia, a declaration that the purported offer submitted by Can-One was invalid, null and void and for the liquidators to award the bid for the purchase of the KJCFB shares to Gold Pomelo as the lawful and successful bidder, having complied with the terms and conditions of the public tender exercise. By way of a response Can-One also sought an order to intervene and to be allowed to proceed with the sale agreement. The judicial commissioner ('JC') hearing the applications for leave and directions dismissed the contributories' leave application and Gold Pomelo's application and allowed the liquidators' application for directions. The JC found no merit in the allegations of conflict of interest and impropriety raised against the liquidators and directed the liquidators to proceed with the sale of KJCFB shares. These were the appeals against that decision. In the appeal the liquidators raised the preliminary objection as to whether the JC's decision giving directions to a liquidator could be appealed against.

Held, allowing the appeals with costs:

(1) A liquidator had to obey a direction from the court because that

direction was a judgment or order emanating from the court and as such it was appealable. The orders by the JC could not be construed as 'advice' but as orders with no discretion accorded to the liquidators. Thus the orders made by the JC in this case in an application by the liquidators for directions, as to whether they should proceed with the sale of the KJCFB shares to Can-One in view of the opposition by a majority of the contributories, were appealable. The JC made specific orders that the liquidators proceed with the completion of the sale of the KJCFB shares to Can-One and the decision determined the rights and liabilities of the parties (see paras 21, 33 and 41).

(2) By a letter dated 27 November 2008 Can-One intended to acquire all the assets and liabilities of KJCFB and all its subsidiaries and associated companies but the KJCFB shares were the assets of the company and not those of KJCFB. As such the letter was not for the purchase of KJCFB shares but rather for the entire assets and liabilities of KJCFB. In effect, Can-One could not make any offer to the liquidators for the acquisition of all the assets and liabilities of KJCFB when the company merely owned 34.63% of the issued share capital of KJCFB. In addition the purported offers by Can-One did not comply with the terms and conditions or procedures stipulated by the liquidators in the public tender exercise. The fact that Can-One's offer did not contain a definitive letter of support from a financier or a marked draft sale and purchase agreement meant that the liquidators ought to have disqualified and rejected the purported offer for non-compliance with the procedures set for the open public tender. Thus Can-One could not have been the successful bidder for the purchase of the KJCFB shares (see paras 111, 112, 114, 117, 121–125 & 127).

(3) The liquidators being officers of the court were required, inter alia, to act with complete impartiality, independence and transparency in conducting and discharging their duties. The liquidators as trustees and agents of the company and/or the contributories of the company were to act in the best interests of the company and contributories in respect of the proposed sale of the KJCFB shares. However, from the facts it could not be ruled out that the liquidators had acted in conflict of interest for their own benefit and for the benefit of their existing clients Can-One and its parent company, from whom they continued to receive financial remuneration. The liquidators had acted in breach of the fiduciary duties that they owed to the contributories of the company who were at all material times the beneficial owners of the KJCFB shares in the liquidation exercise of the company. Once it was shown that there was any pecuniary relationship between the liquidators and their firm KPMG Peat Marwick in which they are partners, together with Can-One and its holding company, there was an automatic disqualification and the liquidators were disqualified

from considering and awarding the bid to Can-One, their client and paymaster (see paras 130, 130(a), (e), (f), (k) & 160).

(4) The material facts involving the liquidators and KPMG Peat Marwick in the entire liquidation exercise of the company remained unrebutted. In fact the liquidators and their firm were inextricably linked, intertwined and involved in the entire liquidation process of the company. As officers of the court the liquidators were not above the law and had to uphold the sanctity of the open public tender exercise which was a judicial sale but serious questions had been raised by the contributories that had to be investigated (see paras 163–164 & 197).

(5) The JC was influenced by the fact that the liquidators had procured the highest possible price for the KJCFB shares but this was an erroneous finding and a clear misdirection based on a misreading and misapplication of the authorities that were relied upon in this case. It is the law that the liquidators as trustees and fiduciaries should be financially disinterested in carrying out their duties and that they should not put themselves in a position where their interest and duty conflicted irrelevant of whether any loss was suffered by the impugned transaction. In the instant case the facts have shown that there was a conflict of interest. As such the JC's decision was fundamentally flawed and constituted a very serious misdirection that allowed for appellate intervention (see paras 170–171, 181 & 184–185).

[Bahasa Malaysia summary

Penghakiman ini adalah mengenai lapan rayuan yang timbul daripada lima permohonan yang berhubung kait, dan yang mana tersebut boleh dibahagikan kepada dua kategori, iaitu, permohonan-permohonan kebenaran dan permohonan-permohonan untuk arahan. Permohonan-permohonan tersebut timbul setelah Kian Joo Holdings Sdn Bhd ('syarikat tersebut') digulung oleh Mahkamah Tinggi pada 30 Januari 1996. Dua individu dalam kapasiti mereka sebagai rakan kongsi KPMG Peat Marwick telah dilantik sebagai penyelesai-penyelesai syarikat tersebut. Syarikat tersebut pada setiap masa matan merupakan satu-satunya pemegang saham terbesar Kian Joo Can Factory Bhd ('KJCFB'), dengan memegang saham biasa yang mewakili 34.63% daripada modal saham yang dikeluarkan KJCFB. Pada 10 Julai 2008, penyelesai-penyelesai itu telah meminta diadakan mesyuarat penyumbang-penyumbang bagi tujuan memastikan hasrat penyumbang-penyumbang berhubung jualan saham-saham KJCFB dalam milikan penyelesai-penyelesai tersebut. Dalam mesyuarat penyumbang-penyumbang tersebut majoriti daripada penyumbang-penyumbang tersebut telah mengundi berpihak kepada jualan keseluruhan saham-saham KJCFB manakala minoriti penyumbang-penyumbang tersebut lebih berpihak kepada pengagihan saham-saham KJCFB secara *in specie*. Pada 30 Julai 2008,

penyelesai-penyelesai tersebut telah membuat keputusan untuk melaksanakan kuasa-kuasa mereka dan menjual saham-saham KJCFB melalui tender awam terbuka. Penyelesai-penyelesai tersebut kemudian seterusnya menetapkan syarat-syarat dan prosedur-prosedur yang perlu diikuti oleh pembida-pembida yang mengemukakan tawaran-tawaran mereka untuk belian saham-saham KJCFB. Salah satu syarat penting amalan tender awam terbuka adalah di mana pembida-pembida patut menyertakan butiran sumber-sumber pembiayaan untuk menyempurnakan transaksi. Di akhir amalan tender awam terbuka dan berdasarkan tarikh akhir yang diubah setelah dilanjutkan oleh penyelesai-penyelesai tersebut kepada 27 November 2008, tiga bidaan telah diterima oleh penyelesai-penyelesai tersebut dan ianya adalah daripada Can-One International Sdn Bhd ('Can-One'), Golden Pomelo Sdn Bhd ('Golden Pomelo') dan satu lagi. Pada 23 Februari 2009, penyelesai-penyelesai tersebut telah menerima tawaran bersyarat Can-One untuk membeli 32.9% daripada keseluruhan modal saham yang dikeluarkan dan berbayar KJCFB dan berikutan itu telah memasuki perjanjian jualan saham bersyarat dengan Can-One. Walau bagaimanapun, di mesyuarat tidak formal penyumbang-penyumbang syarikat tersebut yang telah diadakan pada 30 Mac 2009, kesemua penyumbang-penyumbang yang hadir telah membuat undian bantahan terhadap selesainya jualan-jualan saham KJCFB kepada Can-One. Di mesyuarat penyumbang-penyumbang yang diadakan oleh penyelesai-penyelesai pada 30 April 2009, penyumbang-penyumbang secara sebulat suara telah menentang jualan saham-saham KJCFB kepada Can-One, dan menegur penyelesai-penyelesai tersebut kerana tindakan mereka yang melanggar kewajipan fidusiari mereka, yang mempunyai konflik kepentingan dan juga fraud berhubung proses tender untuk jualan saham-saham KJCFB. Penyumbang-penyumbang berhujah bahawa Can-One tidak mempunyai kemudahan kewangan yang sedia ada untuk membeli saham-saham KJCFB dan bahawa mereka patut disingkirkan kerana tidak mematuhi terma-terma dan syarat-syarat amalan tender awam. Penyumbang-penyumbang majoriti yang diketuai oleh Dato' See Teow Chuan kemudian meneruskan dengan cara notis usul untuk kebenaran memulakan tindakan undang-undang terhadap penyelesai-penyelesai tersebut dan Can-One untuk ganti rugi manakala penyumbang-penyumbang minoriti memohon perintah membatalkan permohonan kebenaran tersebut. Penyelesai-penyelesai tersebut sebaliknya telah memfailkan permohonan meminta arahan berhubung sama ada perlu meneruskan dengan penyelesaian jualan saham-saham KJCFB kepada Can-One menurut syarat-syarat perjanjian jualan saham yang telah dimasukinya dengan Can-One. Pada masa sama Gold Pomelo, pembida yang berjaya telah memfailkan permohonan untuk campur tangan dalam prosiding dan juga memohon, antara lain, deklarasi bahawa tawaran yang dimaksudkan telah dikemukakan oleh Can-One itu adalah terbatal dan tidak sah dan agar penyelesai-penyelesai mengawardkan tawaran untuk belian saham-saham KJCFB kepada Gold Pomelo sebagai pembida yang sah dan berjaya, kerana telah mematuhi terma-terma dan syarat-syarat amalan tender awam. Sebagai

tindak balas Can-One juga telah memohon perintah untuk campur tangan dan agar dibenarkan meneruskan dengan perjanjian jualan itu. Pesuruhjaya kehakiman ('PK') yang mendengar permohonan-permohonan untuk kebenaran dan arahan-arahan tersebut telah menolak permohonan untuk kebenaran penyumbang-penyumbang dan permohonan Gold Pomelo dan membenarkan permohonan untuk arahan penyelesai-penyelesai. PK mendapati tiada merit dalam pengataan-pengataan bahawa terdapat konflik kepentingan dan perbuatan salah yang ditimbulkan terhadap penyelesai-penyelesai itu dan mengarahkan penyelesai-penyelesai meneruskan jualan saham-saham KJCFB. Berikut adalah rayuan-rayuan terhadap keputusan tersebut. Dalam rayuan penyelesai-penyelesai telah menimbulkan bantahan awal berhubung sama ada keputusan PK yang memberikan arahan-arahan kepada penyelesai boleh dirayu.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Penyelesai hendaklah mematuhi arahan daripada mahkamah kerana arahan tersebut adalah penghakiman atau perintah yang datang daripada mahkamah dan oleh itu ia boleh dirayu. Perintah-perintah oleh PK tidak boleh ditafsirkan sebagai 'advice' tetapi sebagai perintah-perintah yang mana tiada budi bicara telah diberikan kepada penyelesai-penyelesai. Oleh itu perintah-perintah yang dibuat oleh PK dalam kes ini dalam permohonan oleh penyelesai-penyelesai untuk arahan, berhubung sama ada mereka patut meneruskan jualan saham-saham KJCFB kepada Can-One memandangkan bantahan daripada penyumbang-penyumbang majoriti, boleh dirayu. PK telah membuat perintah-perintah spesifik agar penyelesai-penyelesai meneruskan dengan penyelesaian jualan saham-saham KJCFB kepada Can-One dan keputusan itu menentukan hak dan liabiliti pihak-pihak (lihat perenggan 21, 33 and 41).

(2) Melalui surat bertarikh 27 November 2008, Can-One bertujuan untuk memperoleh semua aset-aset dan liabiliti KJCFB dan semua syarikat subsidiari dan syarikat bersekutunya tetapi saham-saham KJCFB adalah aset-aset syarikat tersebut dan bukan KJCFB. Oleh itu surat tersebut bukan untuk membeli saham-saham KJCFB malah lebih untuk semua aset dan liabiliti KJCFB. Pada hakikatnya, Can-One tidak boleh membuat apa-apa tawaran kepada penyelesai-penyelesai untuk pemerolehan semua aset dan liabiliti KJCFB sedangkan syarikat tersebut hanya memiliki 34.63% daripada modal saham yang dikeluarkan KJCFB. Tambahan pula tawaran yang dimaksudkan oleh Can-One tidak mematuhi terma-terma dan syarat-syarat atau prosedur-prosedur yang telah ditetapkan oleh penyelesai-penyelesai dalam amalan tender awam. Hakikat bahawa tawaran Can-One tidak mengandungi surat sokongan yang sahih daripada pembiaya atau draf perjanjian jualbeli yang jelas bererti

bahawa penyelesai-penyelesai patut tidak membenarkan dan menolak tawaran yang dimaksudkan itu kerana ketidakpatuhan prosedur-prosedur yang ditetapkan untuk tender awam terbuka. Oleh itu Can-One tidak mungkin menjadi pembida yang berjaya untuk pembelian saham-saham KJCFB (lihat perenggan 111, 112, 114, 117, 121–125 & 127).

(3) Penyelesai-penyelesai yang merupakan pegawai-pegawai mahkamah dikehendaki, antara lain, bertindak dengan penuh keadilan, bebas dan telus dalam menjalankan dan melaksanakan kewajipan mereka. Penyelesai-penyelesai sebagai pemegang amanah dan ejen syarikat tersebut dan/atau penyumbang-penyumbang syarikat tersebut hendaklah bertindak demi kepentingan syarikat dan penyumbang-penyumbang berhubung cadangan jualan saham-saham KJCFB. Walau bagaimanapun, berdasarkan fakta adalah tidak boleh diketepikan bahawa penyelesai-penyelesai telah bertindak dalam konflik kepentingan untuk kepentingan mereka sendiri dan kepentingan pelanggan mereka yang sedia ada Can-One dan syarikat induknya, yang mana daripadanya mereka telah menerima ganjaran pembiayaan yang berterusan. Penyelesai-penyelesai telah bertindak melanggar kewajipan fidusiari mereka terhadap penyumbang-penyumbang syarikat tersebut yang mana pada setiap masa matan pemilik-pemilik benefisiari saham-saham KJCFB dalam amalan pembubaran syarikat tersebut. Setelah dibuktikan bahawa terdapat hubungan kewangan antara penyelesai-penyelesai dan firma mereka KPMG Peat Marwick yang menunjukkan mereka adalah rakan kongsi, bersama Can-One dan syarikat pegangannya, terdapat penyingkiran automatik dan penyelesai-penyelesai tidak dibenarkan mempertimbangkan dan memberi award bidaan kepada Can-One, pelanggan dan jurubayar gaji mereka (lihat perenggan 130, 130(a), (e), (f), (k) & 160).

(4) Fakta penting yang melibatkan penyelesai-penyelesai dan KPMG Peat Marwick dalam keseluruhan amalan pembubaran syarikat tersebut masih tidak dipatahkan. Bahkan penyelesai-penyelesai dan firma mereka amat berkait rapat, mempunyai jalinan dan penglibatan dalam keseluruhan proses pembubaran syarikat tersebut. Sebagai pegawai-pegawai mahkamah, penyelesai-penyelesai tidak melebihi undang-undang dan hendaklah mempertahankan kesucian amalan tender awam terbuka yang merupakan jualan yang tidak berat sebelah tetapi persoalan-persoalan serius telah ditimbulkan oleh penyumbang-penyumbang yang patut disiasat (lihat perenggan 163–164 & 197).

(5) PK telah dipengaruhi oleh fakta bahawa penyelesai-penyelesai telah mendapat harga tertinggi yang mungkin untuk saham-saham KJCFB

tetapi ini merupakan penemuan yang salah dan satu salah arah yang jelas berdasarkan pembacaan yang salah dan penyalahgunaan autoriti-autoriti yang digunakan dalam kes ini. Adalah undang-undang bahawa penyelesai-penyelesai sebagai pemegang amanah dan fidusiari tidak patut mempunyai kepentingan dari segi kewangan dalam melaksanakan kewajipan mereka dan bahawa mereka tidak patut meletakkan diri mereka dalam kedudukan di mana kepentingan dan kewajipan mereka bercanggah tak kira sama ada terdapat apa-apa kerugian dialami akibat transaksi yang dipersoalkan itu. Dalam kes ini, fakta menunjukkan bahawa terdapat konflik kepentingan. Oleh itu, keputusan PK pada dasarnya cacat dan membentuk salah arah yang amat serius bagi membenarkan campur tangan mahkamah rayuan (lihat perenggan 170–171, 181 & 184–185).]

Notes

For cases on liquidators generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 425–426.

For cases on sale of shares, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 877–894.

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Armstrong v Jackson [1917] 2 KB 822, KBD (refd)

Attorney General v Blake (Jonathan Cape Ltd Third Party) [2001] 1 AC 268, HL (refd)

Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd (receiver and manager appointed) (1994) 12 ACLC 364 (folld)

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Blackbird Pies (Management) Pty Ltd (No 2), Re [1970] QWN 33 (refd)

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BPTC Limited (in liq), Re (1992) 8 ACSR 533 (distd)

Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)

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China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

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Coats & Ors v Southern Cross Airlines Holdings Ltd (in liq) & Anor (1998) 16 ACLC 1393 (refd)
Cobrico Developments Inc v Tucker Industries Inc et al 2000 ABQB 766 (not folld)
Commissioner for Corporate Affairs v Peter William Harvey [1980] VR 669 (refd)
Deloitte & Touche AG v Johnson [2000] 1 BCLC 485, PC (refd)
Ex parte The County Council of Kent and The Council of the Borough of Dover; In re The Local Government Act, 1888; Ex Parte The County Council of Kent And The Council of the Borough of Sandwich; In re The Local Government Act, 1888 [1891] 1 QB 725, CA (distd)
GB Nathan & Co Pty Limited (in liq), Re (1991) 5 ACSR 673 (refd)
George Bray v John Rawlinson Ford [1896] AC 44, HL (refd)
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JW Murphy and PC Allen, Re (1996) 19 ACSR 569 (distd)
Kent and others, liquidators of La Banque Ville-Marie v La Communaute Des Soeurs De Charite De La Providence and others; on appeal from the Court of King's Bench for the Province of Quebec (appeal side) [1903] AC 220, PC (refd)
Kwong Shin Kongsi v Kaderbhoy [1949] MLJ 232 (distd)
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Malaysian Bar v Dato' Kanagalingam a/l Veluppillai [2004] 4 MLJ 153, FC (refd)
Morton H Meinhard v Walter J Salmon et al 249 NY 458 (1928); 164 NE 545 (1928) (refd)
National Trustees, Executors & Agency Co of Australasia Ltd v Boyd (1926) 39 CLR 72 (refd)
New Zealand Netherlands Society 'Oranje' Incorporated v Laurentius Cornelis Kuys and another [1973] 1 WLR 1126, PC (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)
Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222, HL (refd)
Queen v Rand and others, The (1865–66) LR 1 QB 230, QBD (refd)
R Gertzenstein, Limited, In re [1937] Ch 115, Ch D (refd)
Rodger v Gourlay (1984) 2 ACLC 594 (distd)
Russell v Austwick (1826) 1 Sim 52 (refd)
Securitibank Ltd, Re [1978] 2 NZLR 133, CA (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Sportman's Leisure & Hobby Warehouse Pty Ltd (in liq), Re (1989) 7 ACLC 1270 (distd)
Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd and others (1997) 144 ALR 159 (refd)
Tempest, In re (1866) LR 1 Ch App 485, CA (refd)

Timberland Ltd (in liq) and Equitable Forestry Services Pty Ltd (in liq), Re (1979) 4 ACLR 259 (refd)
TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567, HC (refd)
Tohru Motobayashi v Official Receiver & Anor [2000] 4 SLR 529, CA (refd)
Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696, CA (refd)
XY & Co, In re [1967] 1 MLJ 161, FC (refd)

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Companies Act 1955 [NZ] s 240(3)
Companies Act 1965 ss 226(3), 236(3), 237(2), (3), (4), 279
Control of Rent Ordinance 1948 s 10
Corporations Act 2001 [AU] s 479(3)
Courts of Judicature Act 1964 s 67(1)
Income Tax Ordinance s 82
Local Government Act 1888 [UK] s 29
Rules of the High Court 1980 O 15 r 6

VK Lingam (R Thayalan with him) (VK Lingam & Co) for the appellants in Civil Appeal Nos W-02–2041 of 2009, W-02–2042 of 2009, W-02–2043 of 2009 and W-02–2044 of 2009.
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Pradeep Kumar (Syarikat KL Rekhraj) for the appellants in Civil Appeal Nos W-02–2198 of 2009, W-02–2199 of 2009 and W-02–2200 of 2009.
VK Lingam (R Thayalan with him) (VK Lingam & Co) for the fourth to 17th respondents.
Izabella de Silva (Benjamin Dawson with her) (Iza Ng Yeoh & Kit) for the fourth to 14th respondents.
Pradeep Kumar (Syarikat KL Rekhraj) for the 16th respondent.
S Suhendran (SY Soh with him) (Kadir, Andri & Partners) for the liquidators.
Porres P Royan (T Sudhar and Jeremy Lee with him) (Shook Lin & Bok) for Can-One International.

Abdul Malik Ishak JCA (delivering judgment of the court):

THE PARTIES

[1] For ease of reference, the parties will be identified as follows. The appellants in Civil Appeal Nos W-02–2041 of 2009, W-02–2042 of 2009, W-02–2043 of 2009 and W-02–2044 of 2009 are the majority contributories ('majority contributories') of Kian Joo Holdings Sdn Bhd ('company') led by Dato' See Teow Chuan ('Dato' See').

[2] The appellants in Civil Appeal No W-02–2503 of 2009 are the minority contributories ('minority contributories') of the company led by Dato' Anthony See Teow Guan ('Dato' Anthony').

[3] The appellants in Civil Appeal Nos W-02–2198 of 2009, W-02–2199 of 2009 and W-02–2200 of 2009 are Gold Pomelo Sdn Bhd ('Gold Pomelo'), the unsuccessful bidder for 133,300,000 shares of the company in Kian Joo Can Factory Bhd ('KJCFB') in the public tender exercise held by Ooi Woon Chee (the first respondent in all the appeals) and Ng Kim Tuck (the second respondent in all the appeals) and these two personalities are the current court appointed liquidators of the company.

[4] The 15th, 18th and 29th respondents in the respective appeals herein are Can-One International Sdn Bhd ('Can-One International'), the successful bidder for 146,131,500 shares of the company in KJCFB representing 32.90% of the entire issued and paid up share capital of KJCFB in the public tender exercise held by the two liquidators.

[5] The fourth to 14th respondents, namely, See Teow Guan (Dato' Anthony), See Tiau Kee, See Tiau Kiong, See Teow Liew, See Tiew Wah, Lim Ah Eng, Foo Kim Fong, Sally See Siew Lian, See Siew Choo, See Siew Wan, and Lim Yoke Choo are collectively referred to as the petitioners.

[6] While KPMG Corporate Services Sdn Bhd will be referred to in this judgment as 'KCSSB'.

THE APPEALS

[7] There are several appeals before this court. However, two main appeals come to the forefront. The first appeal concerned the decision of the learned judicial commissioner ('learned JC') to dismiss the appellants' application for leave to proceed with the suit against the liquidators or, alternatively, leave to institute a fresh action against the liquidators as reflected in encl 476 at the High Court level.

[8] The second appeal centred against the decision of the learned JC ordering the liquidators to complete the sale of 146,131,500 shares in KJCFB to Can-One International at the sale price of RM241,116,975 pursuant to the shares sale agreement dated 23 February 2009 entered into by the liquidators on behalf of the company and Can-One International.

[9] We have read the written grounds of judgment of the learned JC. She wrote one solid composite grounds of judgment and delved into the various arguments advanced by the parties in arriving at her decision.

[10] Learned counsel for the liquidators gave notice of preliminary objection to the effect that the directions given by the learned JC on 25 September 2009 in respect of the liquidators' application for directions in encl 485 are not appealable.

THE PRELIMINARY OBJECTION RAISED BY THE LIQUIDATORS

[11] Learned counsel for the liquidators has given notice that they are taking issue on the appealability of the order of the learned JC on 25 September 2009. The answer lies in s 67(1) of the Courts of Judicature Act 1964 which enacts as follows:

> Jurisdiction to hear and determine civil appeals
>
> 67 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[12] A plain reading of s 67(1) of the Courts of Judicature Act 1964 indicates that a right of appeal is given to the Court of Appeal in relation to any judgment or order of the High Court. *It is certainly fitting to pose the crucial question of whether the order of the learned JC given on 25 September 2009 in respect of the liquidators' application for direction comes with the ambit of s 67(1) of the Courts of Judicature Act 1964*.

[13] The same question surfaced and was considered in *Re Securitibank Ltd* [1978] 2 NZLR 133, a decision of the New Zealand Court of Appeal. There, all the three judges of the Court of Appeal wrote separate grounds of judgments and held that an order given by the court in an application by the court appointed liquidator for directions is appealable. In his judgment, Woodhouse J at pp 133–134 aptly said:

> A preliminary question arises as to whether an appeal will lie to this court from the decision of a judge sitting in the Supreme Court when giving directions to a liquidator pursuant to that provision of the Companies Act. On the basis that no such appeal will lie a motion has been filed in the court to dismiss the appeal and Mr Dugdale has appeared in support of the motion.

A In its simplest form the issue is really whether s 66 of the Judicature Act 1908 gives this court jurisdiction to hear such an appeal. Is the decision arrived at by Barker J within the words 'judgment, decree or order' as they appear in s 66? That issue in turn depends upon whether the decision of the Supreme Court can be regarded as a binding determination.

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[14] Continuing at the same page, Woodhouse J had this to say:

I think that when a court appointed liquidator in the case of a winding up by the court seeks directions under s 241(3) of the Companies Act he is obliged to act C precisely in accordance with the directions that then may be given to him by the court. He is not merely authorised, but obliged, to act on those directions. In other words I think a winding up by the court means what those words suggest. And if the court explicitly directs that the winding up shall proceed in a particular fashion then in so far as the steps to be taken by the liquidator are concerned that appears to me D to be an end of the matter.

As one has learnt to expect, we have received a lucid and helpful argument from Mr Dugdale. But for myself I am satisfied that the various rulings or the directions that were given by Barker J do fall within the provisions of s 66 of the Judicature Act.

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[15] Delivering a separate judgment, Richardson J had this to say in the same case at p 135:

But a decision on an application under s 241(3) of the Companies Act 1955 is in a F special situation, having regard to the role and powers of a liquidator in a winding up by the court. The exercise by him of those powers is expressly subject to the control of the court (s 240(3)), and in this setting it is readily understandable why s 241(3) should provide that the liquidator may apply to the court, in manner prescribed, for directions in relation to any particular matter arising under the winding up. Such a G matter arising under the winding up relates to the proposed acts, or decisions, of the liquidator in exercising his statutory powers.

A decision of the Supreme Court under s 241(3) is, in its terms, a direction to the liquidator. It is not simply an opinion for his guidance which he is free to follow, or ignore, as he chooses. It is binding on him. In certain contexts, 'order' and 'direction' H are interchangeable terms (*Benson v Benson (by her guardian)* [1941] 2 All ER 335 at pp 340–341; [1941] P 90 at p 97). In my judgment, and with the greatest respect to the contrary view reached by Hanger J in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 33 at p 35, this is the position where directions are given to a liquidator under s 241(3) of the Companies Act and such directions constitute an order of the Supreme Court which is appealable under s 66 of the Judicature Act I 1908.

[16] Echoing the same sentiments, Quilliam J said at p 135 of the same case in these words:

> I also agree. The important point here is, I think, that the liquidator is an officer of the court and he sought directions in that capacity. What Barker J did was, at the invitation of the liquidator and upon the facts of the cases placed before him, to give a direction to the liquidator which the liquidator was bound to follow. It is unnecessary for me to traverse it any further for the reasons already indicated by my brethren. I too would dismiss this motion.

[17] There is also s 236(3) of our Companies Act 1965, which is in pari materia with s 240(3) of the New Zealand Companies Act 1955, and that section states that the exercise of the liquidator of his powers is subject to the control of the court. That s 236(3) of our Companies Act 1965 enacts as follows:

> (3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

[18] *Re Securitibank Ltd* has categorically rejected the decision of Hanger J in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 33 at p 35 which states that a direction given by the court being merely advisory, is not appealable.

[19] *Re Securitibank Ltd* propounds a good law. It accords and is in tandem with ss 236(3) and 237(4) of our Companies Act 1965 and that would be that the exercise of the powers of the liquidator is subject to the control of the court.

[20] Section 237(4) of our Companies Act 1965 enacts as follows:

> (4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[21] It is our judgment that when a direction is given by the court, it is more than an advice. It is a judgment or an order and it is certainly appealable. The liquidator's discretion must take a back seat once the court gives its direction and the liquidator has no choice but to obey. The liquidator is bound to act in the way in which the court has so directed because that direction is a judgment or an order emanating from the court and it is appealable.

[22] Nik Hashim JC (later FCJ) in *Abdul Samad bin Haji Alias v Ketua Pengarah Kastam & Eksais Di Raja Malaysia* [1997] MLJU 76, was faced with the same issue and His Lordship preferred to follow *Re Securitibank Ltd* and not *Re Blackbird Pies (Management) Pty Ltd* and this was what His Lordship said:

For the purpose of this case, I am inclined to follow the New Zealand case, *Re Securitibank Ltd*. The issue before this court is whether the directions issued by the court in the first application amounts to a final order.

In my judgment, it is. It was the plaintiff in his capacity as a receiver and company manager of the company who applied for directions under s 183(3) of the Act and he got them. The directions the judge gave are considered as an exercise of his original jurisdiction in terms of s 183(3) of the Act. The directions are in fact orders of the High Court to the plaintiff. They are not simply opinion or advice for his guidance which he is free to follow or ignore as he chooses. He is obliged to act precisely in accordance with the directions. He is not merely authorised, but obliged, to act on those directions. They are binding on him. In my view, it is not the intention of Parliament that the directions under s 183(3) of our Companies Act are to be only advisory opinion of the High Court with no binding effect. For this reason, I would adopt and follow the views in *Re Securitibank Ltd* and decline to follow the contrary views in *Blackbird Pies* and *Re North City Development*.

[23] The Supreme Court of New South Wales in *Re GB Nathan & Co Pty Limited (in liq)* (1991) 5 ACSR 673 dutifully followed *Re Securitibank Ltd*. McLelland J writing for the court had this to say at pp 678–679 of the report:

It should be observed that there are instances where a court has, in proceedings commenced as a liquidator's application for directions, gone on to make orders declaratory of substantive rights, clearly intended to be of binding effect on the parties to the proceedings, and where necessary has made representative orders for this purpose: see for example *Re Staff Benefits Pty Ltd (in liq)* (1979) 4 ACLR 54; [1979] 1 NSWLR 207 and of *Re Securitibank Ltd (in liquidation) and others* [1978] 1 NZLR 97; *Re Securitibank Ltd* [1978] 2 NZLR 133 and *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136. The procedures of the court are sufficiently flexible to enable proceedings commenced as an application for directions to be changed into proceedings for the determination of substantive rights, and this is sometimes a convenient course in order to avoid the need to commence further proceedings involving additional cost and delay: see for example *Anmi Pty Ltd v Williams* [1981] 2 NSWLR 138 at pp 156–157. However it is important that the distinction between the two kinds of proceedings be not lost sight of or blurred, and such a fundamental change should not be permitted unless the court is satisfied that those affected either consent to that course (see for example *Re Standard Insurance Co Pty Ltd (in liq)* (1963) 80 WN (NSW) 1355 and *Murdoch* at pp 100–101), or will not suffer injustice in consequence of the alteration to the status of the proceedings.

I should add that it does not necessarily follow that there is no appeal from an order of the court made on a liquidator's application for directions, although there are statements to this effect in some of the Australian cases commencing with the decision of Hanger J in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 33. The availability of an appeal in any particular case must depend upon the legislative provisions and rules regarding appeals in the particular court of *Re Securitibank Ltd* [1978] 2 N ZLR 133. The availability of an appeal is primarily a matter for decision by the relevant appellate court, but in New South Wales it seems to me to be at least strongly arguable that an order made upon a liquidator's

application for directions would constitute an interlocutory order from which an appeal would lie to the Court of Appeal with leave, pursuant to s 101(2)(e) of the Supreme Court Act 1970 (NSW), and cases may arise where the practical consequences of the giving of directions could justify an appeal.

[24] In *Tohru Motobayashi v Official Receiver & Anor* [2000] 4 SLR 529, the Singapore's Court of Appeal speaking through LP Thean JA refused to follow *Re Blackbird Pies (Management) Pty Ltd* and held that even if the application was one for 'directions', the order made by Lim Teong Qwee JC was clearly appealable.

[25] It is beyond comprehension that the liquidators thought that they could simply thumb at the directions given by the learned JC. The order of the learned JC is not in the nature of an advisory, it is an order that has to be obeyed. There are no two ways about it.

[26] We must proceed further and we have this to say. The liquidators filed their notice of motion for directions on 5 May 2009. It was made pursuant to s 237(3) of the Companies Act 1965 and/or the inherent jurisdiction of the court. The application was supported by the affidavit of the liquidators. In paras 64–70 of the affidavit, the liquidators deposed as follows:

(a) that the majority and minority contributories do not want the sale of the KJCFB shares to Can-One International to be completed and at the fourth contributories' meeting on 30 April 2009, all the contributories voted to abort the sale;

(b) faced with this dilemma, the liquidators were unclear whether they should abort the sale and if they do abort the sale then Can-One International would think that the liquidators had treated them unfairly; and

(c) so, the liquidators sought directions from the court under s 237(3) of the Companies Act 1965 on the question of 'whether the liquidators should proceed with the sale of the 146,131,500 KJCFB shares at RM1.65 per share for an aggregate purchase consideration of RM241,116,975 to Can-One International particularly in view of the outcome of the fourth contributories' meeting?'

[27] It must be borne in mind that Can-One International made an application to intervene in the application for directions and was added as a party. We take note that the very fact that Can-One International applied to intervene and be made a party in the directions proceedings clearly show that their legal interests and their rights as a successful bidder in respect of the KJCFB shares were directly affected. It was obvious that Can-One

A International was added as a party so that all the matters in dispute can be effectively and completely determined and adjudicated upon by the High Court. Lord Diplock succinctly formulated the test for an application to intervene and be added as a party in the case of *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 (PC) at p 56 in these salient words:

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> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

C

[28] The upshot of it all is this. That disputes between the parties surfaced in this way:

(a) The majority contributories and the minority contributories took a diametrically opposite view and they objected to the sale of the KJCFB shares to Can-One International on varied grounds, namely, conflict of interest of the liquidators because the firm KPMG Peat Marwick in which the liquidators are partners and the auditors of Can-One International and its parent company, Can-One Bhd; there was a solicitation of bribes by Ooi Woon Chee from the representative of a bidder at two private and secret meetings held outside the liquidators' office; and there was no valid and legal offer made by Can-One International to purchase the KJCFB shares.

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(b) The liquidators asserted that there was no conflict of interest, no solicitation of bribe, the offer by Can-One International was both valid and legal and that Can-One International was a successful bidder having complied with the terms and conditions of the open public tender documents.

F

G (c) Can-One International claimed that the shares sale agreement dated 23 March 2009 as alluded to earlier should be completed by the liquidators.

(d) Gold Pomelo objected to the sale of the KJCFB shares to Can-One International and claimed that they are the successful bidder for the reasons as set out above at (a).

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(e) The liquidators were in a dilemma whether to proceed and complete the sale of KJCFB shares to Can-One International or to abort it.

I

[29] The High Court had to resolve these disputes and arrive at a decision. The meaning of the word 'dispute' has been set out by Jemuri Serjan SCJ in *Co-operative Central Bank Ltd v Haji Rosli bin Haji Kamaruddin* [1991] 2 MLJ 37 at p 41 in this way:

We must, however, perforce decide whether there is in fact a dispute between the parties in the first place. This leads us to the question of what is a dispute. In this regard we were referred by learned counsel for the respondent to the Supreme Court of India case of *Gujarat State Co-operative Land Development Ltd v PR Mankad & Anor* AIR 1979 SC 1203. Sarkaria J, at p 1207 defined a dispute in the following terms:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.
>
> With respect we do not see any reasons to disagree with this definition of dispute.

[30] Before the learned JC, all the parties proceeded on the basis that they were bound by the directions to be given by Her Ladyship. Both written and oral submissions were advanced before the learned JC. It was a contested hearing and no stones were left unturned. Indeed, the learned JC decided the dispute and ordered the liquidators to complete the shares sale agreement dated 23 March 2009 entered into with Can-One International for the sale of the KJCFB shares. The learned JC also ordered costs in favour of the liquidators. The decision of the learned JC finally disposed of the disputes between the parties and brought the proceedings to an end.

[31] The outcome of the decision of the learned JC was this. That the rights and liabilities of the parties were finally determined by the court. The majority and minority contributories lost their rights to abort the sale. Gold Pomelo lost their right as a successful bidder. Can-One International won their right as a successful bidder. The liquidators succeeded — they won their right in that there was no conflict of interests in the award of the bid to Can-One International and that the open public tender was held to be conducted professionally.

[32] The learned JC made specific orders. That the liquidators are to proceed with the completion of the sale of the sales in accordance with the shares sale agreement. Can-One International's alternative prayer that the liquidators be directed to proceed with the shares sale agreement between the liquidators and Can-One International was also allowed.

[33] We say that the orders of the learned JC cannot be construed as an 'advice'. It was an order by the learned JC and there was no discretion accorded to the liquidators.

[34] This court in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113 construed s 67(1) of the Courts of Judicature Act 1964 liberally. Gopal Sri Ram JC (later FCJ) speaking for this court aptly said at pp 118–119 of the report:

A Before expressing any view on the relevance of these cases to the present instance, it is necessary to hearken to some of the relevant statutory provisions. First, there is s 67(1) of the Courts of Judicature Act 1964 ('the Act'). It says that this court has jurisdiction to hear and determine appeals 'from any judgment or order of any High Court'. It is a very wide provision. There are limitations imposed by s 68(2). But they are not relevant for present purposes. Section 67(1) itself contains a restriction. It will be dealt with in the appropriate place in this judgment.

B

My learned brothers and I are of the view that the words 'any judgment or order or any High Court' in s 67(1) should be read liberally. That is the way in which they were read by this court in *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696. If we accept Mr Narayanan's argument, it would cut down the full effect of the section. It will limit the clear words of the section. We should not do that.

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There is constitutional reinforcement for the view we take. Article 121(1B) of the Federal Constitution after creating the Court of Appeal confers jurisdiction 'to determine appeals from the decisions of a High Court or a judge thereof' but not from a decision of the registrar of the High Court. The article goes on to say in effect that federal law may confer other jurisdictions. So, if we read s 67(1) together with art 121(1B), we can see at once that no limitation may be placed upon the appellate jurisdiction of this court.

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[35] In *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696 (CA), NH Chan JCA (as he then was) speaking for this court had this to say at pp 701–702 of the report:

F It is to be noted that the word 'decision' is not used in s 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s 3. This is because, in s 67(1), civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the Legislature.

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In our judgment we hold, therefore, that the objection to the jurisdiction of this court to hear and determine this appeal is misconceived and misplaced. This court has the jurisdiction to hear and determine any appeal from the High Court in a civil cause or matter.

I

[36] The words employed in s 67(1) of the Courts of Judicature Act 1964 are plain and unambiguous and effect must be given to them (*Malaysian Bar v Dato' Kanagalingam a/l Veluppillai* [2004] 4 MLJ 153 (FC)).

[37] There are passages in the judgment of Fitzgerald P in *Coats & Ors v Southern Cross Airlines Holdings Ltd (in liq) & Anor* (1998) 16 ACLC 1393 at pp 1400–1401 that merit reproduction. At p 1400, His Lordship said: A

> In my opinion, not only did the liquidator not have power to give the notice directed by the chamber judge without that direction, His Honour had no power to give the direction. Further, had the power existed, I am of the opinion that His Honour should not have given the direction which he did. B

[38] Continuing at the same page and spilling over to p 1401, Fitzgerald P had this to say: C

> At the outset, while referring to the chamber judge's direction as an order, I noted the respondent's contention that it is not appealable; in effect, that the direction is not an order within the meaning of the Supreme Court Acts of 1991 and 1995 and RSC O 70. That submission falls for consideration in the context that the direction was not only incorrectly made but outside the power provided by sub-s 479(3) of the Corporations Act and will, or at the least might, deprive the appellants of rights which they might otherwise have if the respondent published the notice. Two matters to be borne in mind are that the respondent considers that the notice might be defamatory and that its publication without a direction of the court might be outside the qualified privilege provided to a liquidator acting in the course of his or her duties by sub-s 535(1) of the Corporations Act. Those were the considerations which influenced the respondent to seek the direction, and, while he denies that the direction is an order from which an appeal lies, he continues to mainain that it will protect him by depriving the appellants of any defamation claims they might otherwise have by reason of the publication of the notice. D E F
>
> There are a number of decisions concerning whether a direction given under sub-s 479(3) of the Corporations Act is an order. I do not consider it necessary to review those decisions. The issue does not depend on a semantic difference between 'order' and 'direction' which in this context are virtually interchangeable. In my opinion, the position was correctly stated by McLelland J in *Re GB Nathan & Co Pty Limited (in liq)* (1991) 9 ACLC 1291; (1991) 24 NSWLR 674. His Honour said: G
>
> > ... it does not necessarily follow that there is no appeal from an order of the court made on a liquidator's application for directions, although there are statements to this effect in some of the Australian cases commencing with the decision of Hanger J in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 33. H
> >
> > The availability of an appeal in any particular case must depend upon the legislative provisions and rules regarding appeals in the particular court: of *Re Securitibank Ltd* [1978] 2 NZLR 133. The availability of an appeal is primarily a matter for decision by the relevant appellate court, ... cases may arise where the practical consequences of the giving of directions could justify an appeal. I

More recently, the matter was discussed at some length by Northrop J in *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd (receiver and manager appointed)* (1994) 12 ACLC 364 at pp 374 ff; (1994) 49 FCR 334 at pp 346

ff. After noting (1994) ACLC 364 at p 375; (1994) 49 FCR 334 at p 349 that the 'essence of the contention on the part of counsel was that the preponderance of legal authority and practice is to preclude a conclusive determinative power being derived from s 479(3)', His Honour, after reference to *Re GB Nathan & Co Pty Limited (in liq)* (1991) 9 ACLC 1291; (1991) 24 NSWLR 674 said:

> ... There is no logical reason why final orders binding on other persons cannot be made on applications under s 479(3) .... The second passage from the judgment of McLelland J cited above refers ... to cases where a party 'will not suffer injustice in consequence of the alteration to the status of the proceedings'. This is the crucial matter. In proceedings brought by a liquidator under s 479(3), I can see no reason why binding orders cannot be made where the parties affected have been given the opportunity to be heard ....
>
> Statements by McPherson J in *Re Neander Constructions Pty Ltd* (1988) 6 ACLC 865 at p 866 support this approach.
>
> The views expressed in those passages are consistent with the established proposition that every operative and conclusive judicial act is an order (*Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 15 ATD 179 at p 181; (1968) 121 CLR 45 at p 64; *Legal Practitioners Complaints Committee v A Practitioner* (1987) 46 SASR 126 at p 127 per King CJ and p 130 per Prior J). This court's appellate jurisdiction is provided for in ss 29 and 69 of the Supreme Court Act of 1991, and extends to every order made in the trial division. Whether or not a judicial decision involves an order depends on its effect. There is no valid policy reason to exempt any judicial decision imposing obligations or otherwise affecting a person's rights or interests from review on appeal. On the contrary. For example, in the present context it might often be desirable that a liquidator have a right of appeal from a decision directing him to act in a manner he disagreed with, or refusing him a direction to which he was entitled.
>
> Whether or not that is so, the direction made by the chamber judge both was beyond power and erroneously expanded the respondent's duties in a manner which exonerated him from a liability which he might otherwise have to the appellants if he published the notice without a direction from the court. That advantage to the liquidator and detriment to the appellants was the very purpose of the direction. In my opinion, such a direction after a contested hearing is an appealable order.

[39] The same principles of law were propounded by Northrop J in *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd (receiver and manager appointed)* (1994) 12 ACLC 364 at pp 375, 376 and 378 and we gratefully adopt them.

[40] The liquidators relied on the following eight authorities to drive home the point that the directions of the learned JC were not appealable:

(a) *Re Sportman's Leisure & Hobby Warehouse Pty Ltd (in liq)* (1989) 7 ACLC 1270. This case can be distinguished in that the court in this case was reluctant to give any directions.

(b) *Re Security Provident Fund Limited (in liq)*; *Rodger v Gourlay* (1984) 2 ACLC 594. In this case, the court dismissed the liquidator's summons for directions because the liquidator had asked the court to determine finally the rights and liabilities of the company and the mortgagor arising out of the mortgage to which the company was a party.

(c) *Re JW Murphy and PC Allen* (1996) 19 ACSR 569; *Re BPTC Limited (in liq)* (1992) 8 ACSR 533. In this case, there was an application by the liquidator for an opinion and an advice of the court in relation to the proposed deed which was not yet executed.

(d) *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* [2003] 45 WASC 424. In this case, no binding determination of the substantive issues can be made under s 479(3) of the Corporations Act 2001.

(e) *John William Woods as liquidator of the Lewis Driscoll & Bull Unregistered Managed Investment Schme v Haydn James Dodge & Sheila Ann Dodge* [2003] FCA 1066. In this case, the court declined to give any direction and held that it was inappropriate to make any directions where the liquidators was seeking a finding to protect that certain events bear a particular legal character.

(f) *In re XY & Co* [1967] 1 MLJ 161 (FC). In this case, the board of review stated a case on certain questions of law for the opinion of the High Court under s 82 of the Income Tax Ordinance (Cap 166). The High Court then remitted the case to the board with its opinion.

(g) *Kwong Shin Kongsi v Kaderbhoy* [1949] MLJ 232. In this case, the Rent Assessment Board pursuant to s 10 of the Control of Rent Ordinance 1948 referred two questions of law to the High Court pertaining to a tenancy agreement.

(h) *Ex parte The County Council of Kent and The Council of the Borough of Dover; In re The Local Government Act, 1888; Ex Parte The County Council of Kent And The Council of the Borough of Sandwich; In re The Local Government Act, 1888* [1891] 1 QB 725. In this case, certain questions were submitted to the High Court of Justice under s 29 of the Local Government Act 1888 by the County Council of Kent and the Councils of the Boroughs of Dover and Sandwich and that where such questions were referred to the High Court of Justice, it was entirely consultative and nothing else.

[41] With the exception of the case of *In re XY & Co* which dealt with the previous s 67(1) of the Courts of Judicature Act 1964, all the other cases relied upon by the liquidators did not touch on that section of the law. They can readily be distinguished on the facts. Here, in the present appeal, the learned JC made specific orders and determined the rights and liabilities of the parties

before the court. We hold that those orders of the learned JC are certainly appealable.

THE FACTS

[42] The petitioners, on 9 September 1994, filed the petition to wind up the company. And by consent of the petitioners together with the first, 11th and 13th appellants, the company was ordered to be wound up by the Kuala Lumpur High Court on 30 January 1996.

[43] At about the same time, Abdul Jabbar bin Abdul Majid and Ng Kim Tuck from KPMG Peat Marwick were appointed as the joint and several liquidators of the company. The firm of KPMG Peat Marwick was suggested by Dato' See on behalf of some other appellants to be appointed as the liquidators of the company.

[44] It must be borne in mind that the High Court winding up order categorically referred to the liquidators as individuals from KPMG Peat Marwick.

[45] On 2 October 2007, Ooi Woon Chee of KCSSB was appointed as one of the liquidators of the company to replace Abdul Jabbar bin Abdul Majid.

[46] It must be noted that Ooi Woon Chee who replaced Abdul Jabbar bin Abdul Majid also came from KPMG Peat Marwick. Thus, we have a situation where both the liquidators (Ooi Woon Chee and Ng Kim Tuck) came from KPMG Peat Marwick.

[47] Now, the liquidators of the company were entrusted with the assets of the company as trustees and agents of the company. And the appellants as contributories are the beneficial owners of the shares of KJCFB in the liquidation exercise of the company.

[48] Both KCSSB and KPMG Peat Marwick are the corporate vehicles or entities used by the liquidators in carrying out their obligations and duties as the liquidators of the company.

[49] It is significant to note that both the liquidators are also the *partners* of KPMG Peat Marwick, an international firm of accountants and perform various services encompassing audit, tax, financial advisory and business advisory. It is also significant to note that both the liquidators have been appointed as the liquidators of the company *in their capacity as partners of KPMG Peat Marwick*.

[50] Furthermore, it must be noted that all fees, disbursements and advances paid and to be paid to the liquidators are paid to KCSSB and KPMG Peat Marwick and not directly to the personal pockets of the liquidators.

[51] It is ideal to mention that the company is the single largest shareholder of KJCFB, and holding 153,868,617 ordinary shares of RM0.25 each representing 34.64% of the issued share capital of KJCFB ('KJCFB shares'). In addition to that, KJCFB also holds 54.83% of the issued ordinary share capital of Box Pak (Malaysia) Bhd ('Box Pak'), a company listed in the Kuala Lumpur Stock Exchange. And it must be emphasised that KJCFB holds the controlling interest in Box Pak.

[52] On 10 July 2008, the liquidators, using KCSSB and KPMG Peat Marwick called for a meeting of all the contributories named in the register of the members of the company pursuant to s 237(2) of the Companies Act 1965. The purpose of calling for that meeting was to ascertain the wishes of the contributories regarding the disposal of the KJCFB shares in the liquidators' possession ('the contributories' meeting').

[53] Now, at the contributories' meeting, half in number and a majority in value of the contributories were present, either personally or by proxy, being 50% in number and 52% in value, *and they voted in favour of the sale of the entire KJCFB shares. These would be the majority contributories*.

[54] *While the remaining contributories, being holders of 48% in value of the shares preferred distribution of the KJCFB shares in specie. These would be the minority contributories*.

[55] On 30 July 2008, the liquidators in exercise of their powers decided to sell the KJCFB shares by way of an open public tender.

[56] The liquidators had caused KCSSB and KPMG Peat Marwick to place advertisements in *The Star* newspaper on 4 August 2008 and in The Edge Malaysia from 11 August 2008 to 17 August 2008 inviting interested parties to register their expression of interest to acquire the KJCFB shares. It is significant to note that the name and logo of KPMG Peat Marwick appeared in these advertisements. That advertisements called on the interested parties to contact KCSSB representatives in order to register their interest.

[57] Various parties responded to the advertisements. And that would include Gold Pomelo, Can-One International and other undisclosed parties. These interested parties contacted the liquidators, KCSSB and KPMG Peat Marwick when they responded to the advertisements.

[58] The liquidators, KCSSB and KPMG Peat Marwick provided to the interested parties the terms on which the liquidators, acting for the company, agree to supply information relating to the proposed sale of the KJCFB shares.

[59] Once the interested parties have received the terms relating to the proposed sale of the KJCFB shares, the liquidators, KCSSB and KPMG Peat Marwick then proceeded to set out the procedures to be followed by the parties to submit the offer for the purchase of the KJCFB shares.

[60] One the fundamental terms of the open public tender exercise was that the bidders should include details of the sources of funding to complete the transaction. Clause 2.2 of the terms and conditions pertaining to financing clearly stipulates that, 'where third party financing is required, you should attach a definitive letter of support for your offer from the third party'.

[61] And the liquidators, KCSSB and KPMG Peat Marwick expressly stated that the offers, in accordance with the procedures laid down, should be received by the liquidators, KCSSB and KPMG Peat Marwick by 5.30pm on Tuesday 28 October 2008 and the offers shall be capable of and open for acceptance for a period of 90 days from the offer dateline and that would be from 28 October 2008.

[62] The deadline for the submission of the offers was varied by the liquidators, KCSSB and KPMG Peat Marwick to 5.30pm on Thursday 27 November 2008 and the offers shall be capable of and open for acceptance for a period of 60 days from the offer deadline and that would be from 27 November 2008.

[63] The liquidators' solicitors, Messrs Lee Hishammuddin Allen & Gledhill had by letter dated 28 November 2008 informed the appellants' solicitors, Messrs VK Lingam & Co that three bids were received by the liquidators on the closing date for submission of bids on 27 November 2008.

[64] The liquidators had by letter dated 31 December 2008 addressed to Gold Pomelo, a company owned by Dato' See and the second appellant, extended the dateline for submissions of improved bids to 5pm on Monday 19 January 2009.

[65] By letter dated 23 January 2009, the liquidators wrote to Gold Pomelo and requested the latter to extend the validity of its offer until 20 February 2009.

[66] And by a further letter dated 10 February 2009 addressed to Gold Pomelo, the liquidators requested that the revised offer made by Gold Pomelo should remain valid and open for acceptance until 20 February 2009.

[67] It must be observed that on 23 February 2009, the liquidators, KCSSB and KPMG Peat Marwick accepted the conditional offer made by Can-One International to purchase from the company 146,131,500 KJCFB shares, which represents 32.90% of the entire issued and paid up share capital of KJCFB at the price of RM1.65 per share for the total purchase consideration of RM241,116,975 payable in cash.

[68] *Messrs Lee Hishammuddin Allen & Gledhill, the liquidators' solicitors, had by letter dated 23 February 2009 informed the appellants' solicitors, Messrs VK Lingam & Co that the liquidators had on 23 February 2009 accepted the conditional offer from Can-One International to purchase 32.90% of the entire issued and paid up share capital of KJCFB.*

[69] On 23 February 2009, the liquidators entered into a conditional shares sale agreement with Can-One International for the sale of 146,131,500 shares in KJCFB by the company to Can-One International.

[70] Thereafter, on 30 March 2009, the liquidators called for an informal meeting of the contributories.

[71] On 30 March 2009, at the informal meeting, all the contributories of the company who were present had voted against the completion of the sale of the KJCFB shares to Can-One International.

[72] On 30 April 2009, the liquidators called for a meeting of the contributories. At that contributories' meeting, all the contributories of the company had voted against the completion of the sale of the KJCFB shares to Can-One International. To put it bluntly, all the contributories of the company unanimously opposed the sale of the KJCFB shares to Can-One International.

[73] It must also be noted that during the contributories' meeting held on 30 April 2009, all the contributories had rebuked the liquidators for their acts in breach of fiduciary duties, conflict of interests as well as fraud in regard to the tender process for the sale of the KJCFB shares. It must be emphasised that all the contributories had executed a document setting out their dissatisfaction as to the entire conducts or acts of the liquidators.

THE RELEVANT ENCLOSURES

[74] The majority contributories by way of a notice of motion dated 6 April 2009 as seen in encl 476 sought for the following order, namely:

A that the majority contributories be granted leave to proceed with the legal action under Kuala Lumpur High Court Civil Suit No D8–22–505 of 2009 or alternatively leave to commence legal action against the liquidators, KCSSB, KPMG Peat Marwick and Can-One International for damages for alleged breach of fiduciary duties and/or alleged fraud.

B

[75] The minority contributories by way of a summons in chambers dated 6 May 2009 as reflected in encl 497 sought an order to strike out the leave application as against the liquidators.

C

[76] The liquidators, on the other hand, by way of a notice of motion dated 5 May 2009 as reflected in encl 485 sought for directions whether the liquidators should proceed with the completion of the sale of KJCFB shares to Can-One International pursuant to the terms of the shares sale agreement D dated 23 March 2009 entered into between the company and Can-One International.

[77] Gold Pomelo by way of a notice of motion dated 16 June 2009 as seen in encl 506 (see pp 325A–330A of the appeal record at Vol 4) sought the E following orders, namely:

(a) that leave be granted to Gold Pomelo Sdn Bhd (Company No 838451 H) pursuant to O 15 r 6 of the Rules of the High Court 1980 and/or pursuant to the inherent jurisdiction of this honourable court to F intervene in the proceedings herein and/or the notice of motion for directions dated 5 May 2009 filed under s 237(3) of the Companies Act 1965 by Ooi Woon Chee and Ng Kim Tuck, the liquidators of Kian Joo Holdings Sdn Bhd, the first respondent abovenamed (the liquidators);

G

(b) that leave be granted to Gold Pomelo Sdn Bhd to make the application herein;

(c) a declaration that the purported bids/offers dated 27 November 2008, 19 January 2009 and 20 February 2009 submitted by Can-One H International Sdn Bhd to the liquidators of the first respondent are invalid, null and void;

(d) that the act and/or decision of the liquidators of the first respondent to award the purported bid dated 23 February 2009 for the sale of I 146,131,500 ordinary shares of RM0.25 each in Kian Joo Can Factory Bhd (KJCFB) representing approximately 32.90% of the entire issued and paid up share capital of KJCFB (the said KJCFB shares) in the public tender exercise held by the court appointed liquidators of the first respondent to Can-One International Sdn Bhd (Company No

729929K) be reversed and/or modified pursuant to s 279 of the Companies Act 1965 and/or pursuant to the inherent jurisdiction of this honourable court;

(e) consequently the shares sale agreement dated 23 March 2009 entered into between the company (by the liquidators) and Can-One International Sdn Bhd (Company No 729929K) for the sale of the said KJCFB shares be cancelled and/or terminated pursuant to s 279 of the Companies Act 1965 and/or pursuant to the inherent jurisdiction of this honourable court;

(f) that this honourable court direct and/or order the liquidators of the company to award the bid for the purchase of 133,300,000 ordinary shares of RM0.25 each of the company in Kian Joo Can Factory Bhd (KJCFB) representing approximately 30.01% of the entire issued and paid up share capital of KJCFB at RM1.55 per share to Gold Pomelo Sdn Bhd (Company No 838451 H) as the then lawful and successful bidder and the liquidators of the company be directed and/or ordered to take all necessary steps to complete the sale of 133,300,000 ordinary shares of RM0.25 each of the company in KJCFB representing approximately 30.01% of the entire issued and paid up share capital of KJCFB at RM1.55 per share in favour of Gold Pomelo Sdn Bhd in accordance with the terms and conditions of the public tender exercise/documents pursuant to s 279 of the Companies Act 1965 and/or pursuant to the inherent jurisdiction of this honourable court;

(g) alternatively, the proposed intervener, Gold Pomelo Sdn Bhd be granted leave pursuant to the inherent jurisdiction of this honourable court to commence such legal actions against Mr Ooi Woon Chee and Mr Ng Kim Tuck in an action to be commenced by Gold Pomelo Sdn Bhd against the liquidators and/or KPMG and/or KPMG Corporate Services Sdn Bhd and/or Can-One International Sdn Bhd;

(h) the costs of the applications herein be borne by Mr Ooi Woon Chee and Mr Ng Kim Tuck personally; and

(i) that there be such further or any other orders, reliefs and/or directions as this honourable court may deem fit and proper to grant.

[78] By way of a response, Can-One International filed the following notices of motion:

(i) a notice of motion dated 6 May 2009 as seen in encl 493 for an order to intervene and to oppose the leave application;

(ii) a notice of motion dated 15 May 2009 as reflected in encl 500 for an order to intervene and to oppose the directions and in the alternative that the liquidators be directed to proceed with the sale agreement; and

A (iii) a notice of motion dated 30 June 2009 as seen in encl 523 for an order to intervene and to oppose Gold Pomelo's application.

[79] The grounds raised by Can-One International in opposing the leave application are as follows:

B

(a) that the Kuala Lumpur High Court Civil Suit No D8–22–505 of 2009 or the proposed legal action in the alternative against the liquidators, KCSSB, KPMG Peat Marwick and Can-One International for alleged breach of fiduciary duties, conflict of interest and/or fraud, is not only an abuse of the process of the court and devoid of merit, it is also scandalous, frivolous and vexatious; and

C

(b) that the alleged breach of fiduciary duties, conflict of interest, invalidity of the award to Can-One International and/or fraud have been raised by the majority contributories for the purposes only of disrupting or impeding the completion of the sale of KJCFB shares to Can-One International.

D

[80] While the grounds raised by Can-One International in opposing the directions are as follows:

E

that the directions sought by the liquidators are an abuse of the process under s 237(3) of the Companies Act 1965, and that in any event there are no valid reasons not to proceed with the completion of the sale of the KJCFB shares in pursuance of the sale agreement.

F

[81] And the grounds raised by Can-One International to oppose Gold Pomelo's application are as follows:

G

(a) that the reliefs sought by Gold Pomelo are an abuse of the process of the court in that the directors and/or shareholders of Gold Pomelo are none other than the contributories of the company, and that the reliefs are similar or identical to the reliefs sought by the majority contributories; and

H

(b) that the alleged breach of fiduciary duties, conflict of interest, invalidity of the award to Can-One International and/or fraud have been raised for the purposes of disrupting or impeding the completion of the sale of KJCFB shares to Can-One International.

I

[82] At this juncture, it would be appropriate for us to state, briefly, the grounds for Gold Pomelo's notice of motion in encl 506. Firstly, that the bids/offers submitted by Can-One International are invalid in that they were not in compliance with the terms and conditions in the tender documents. Secondly, that there had been a conflict of interest as there existed a pecuniary

relationship between Can-One International, the liquidators, KCSSB and KPMG Peat Marwick, and that the liquidators had elicited personal financial gratification from the representatives of Gold Pomelo in return for the liquidators to award the bid for the shares to Gold Pomelo. Thirdly, that the sale of KJCFB shares to Can-One International is null and void and that, consequently, the award for the sale of the shares should be made in favour of Gold Pomelo.

[83] The grounds supporting the liquidators' notice of motion in encl 485 for directions are as follows:

(a) that the majority contributories have, in objecting to the sale of the KJCFB shares to Can-One International made various allegations of impropriety and fraud against the liquidators in respect of the conduct of the public tender exercise and have commenced the Kuala Lumpur High Court Civil Suit No D8–22–505 of 2009;

(b) that the liquidators had convened a contributories' meeting on 30 April 2009 for the purpose of formally ascertaining the views of the contributories and that all the contributories present be it personally or by proxy had voted to abort the sale to Can-One International; and

(c) that under the terms of the sale agreements, Can-One International are entitled to seek for costs in the aggregate sum of RM300,000 and that specific performance is not available in the event that the company shall fail to perform its obligations thereunder.

THE DECISION OF THE LEARNED JC

[84] We must reiterate that five applications were filed in the winding up court in relation to the sale of KJCFB shares which were the subject matter of the decision of the learned JC dated 25 September 2009. These five applications are inter-related and they can broadly be divided into two categories:

(a) leave applications; and

(b) directions' applications.

[85] In regard to the leave applications, we have two enclosures, namely:

(a) Enclosure 476 dated 6 April 2009 was filed by the appellants for leave to commence action against, inter alia, the liquidators for misconduct in relation to the sale of the KJCFB shares. And encl 476 was dismissed with costs.

(b) Enclosure 493 dated 6 May 2009 was filed by Can-One International to intervene the winding up and to oppose encl 476. Since encl 476

was dismissed, encl 493 was allowed. And the appellant have appealed against the judgment dismissing encl 476.

[86] In regard to the directions' applications, we have four enclosures, namely:

(a) Enclosure 485 dated 5 May 2009 was filed by the liquidators for directions under s 237(3) of the Companies Act 1965 in regard to the question of whether to complete the sale at RM241,116,975. The High Court allowed encl 485 and directed the liquidators to proceed with the sale to Can-One International.

(b) Enclosure 500 dated 15 May 2009 was filed by Can-One International for leave to intervene in the winding-up and for, inter alia, an order that the liquidators proceed with the sale.

(c) Enclosure 506 dated 16 June 2009 was filed by Gold Pomelo seeking leave to intervene in Can-One International's application in encl 485 and for an order that the sale of KJCFB shares to Can-One International at RM241,116,975 be terminated and for the liquidators to award the sale of the assets to Gold Pomelo at the price of RM206,615,000. Since the High Court ordered the sale to Can-One International to be completed as per encl 485, the High Court then dismissed encl 506.

(d) Enclosure 523 dated 30 June 2009 was heard and disposed of in open court on 3 August 2009 by another High Court judge (see pp 38A–43A of the appeal record at Vol 2) and was filed by Can-One International to oppose encl 506. Since the High Court dismissed encl 506, encl 523 was allowed.

[87] The appellants, the majority contributories and Gold Pomelo filed notices of appeal against the directions granted under encl 485. Gold Pomelo has filed a notice of appeal dated 30 September 2009 against the dismissal of its application under encl 506 and in allowing Can-One International's application under encl 523.

[88] We would like to make this observation. It is this. That the first appellant, Dato' See, through Gold Pomelo apart from asking for leave to intervene in Can-One International's application in encl 485 also wants this court to direct the liquidators to sell the shares of KJCFB to him at RM206,615,000 and terminating the current sale to Can-One International at RM241,116,975.

[89] By way of an elaboration, we have this to say. The learned JC dismissed the leave application and Gold Pomelo's application and allowed the

liquidators' application for directions. Consequently, the learned JC also dismissed Can-One International's prayer to oppose the directions but had allowed the alternative prayer that the liquidators be directed to proceed with the sale agreement.

[90] And in dismissing the leave application and Gold Pomelo's application and in directing the liquidators to proceed with the sale of KJCFB shares to Can-One International, the learned JC found no merit whatsoever in the allegations of conflict of interest and impropriety raised against the liquidator Ooi Woon Chee.

[91] The learned JC in her written grounds of judgment summarised the principles upon which leave is granted in order to commence legal action against a liquidator in this way:

(a) that the court is duty bound to keep in mind its solemn duty to protect the liquidator from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process in deciding on whether or not to grant leave;

(b) that on the facts of any particular case, sufficient merits have to be shown, and that while it does not necessarily follow that a prima facie case must be demonstrated, no specific threshold is set for all cases because each case must be evaluated and analysed on its own facts;

(c) that mere assertion is insufficient and that the court is free to take into account a variety of factors and circumstances including the sufficiency of the evidence adduced, the likelihood of success of the prospective suit, and finally, whether any pecuniary loss had been suffered; and

(d) that there must be in existence a minimum or threshold level of evidence possessing sufficient merit to substantiate the claim of a breach of duty to warrant the grant of leave.

CONTRIBUTORIES' MEETINGS

[92] There were four contributories' meetings. The first was held on 12 July 1996. The second was held on 8 February 1999. The third was held on 10 July 2008. Finally, the fourth was held on 30 April 2009.

[93] The liquidators convened the first contributories meeting for the purpose of ascertaining the wishes of the contributories regarding the disposal of the assets of the company. At the first meeting, 52% in number and 55% in value of the contributories were present and voting and they voted in favour of a sale of all the KJCFB shares and warrants.

[94] Again, a second meeting of the contributories was convened to seek the views of the contributories pertaining to the sale of, inter alia, KJCFB shares held by the company. The outcome of the second meeting was exactly the same as the first meeting.

[95] The third meeting, also called by the liquidators was for the same purpose. It was for the purpose of ascertaining the wishes of the contributories regarding the disposal of the KJCFB shares. At the third meeting, 50% in number representing 52% in value of the contributories present and voting (excluding the estate of Seah Ah Keoh @ Seah Yeo), voted for a sale of the entire KJCFB shares while 50% in number and 48% in value of the contributories present and voting(excluding the estate of Seah Ah Keoh @ Seah Yeo), voted for a distribution in specie of KJCFB shares.

[96] The liquidators convened the fourth meeting of the contributories of the company in order to formally determine the views of the contributories as to whether the sale of the KJCFB shares to Can-One International should be proceeded with. *At this fourth meeting, all the contributories present and voting, either personally or by proxy, voted to abort the sale of the KJCFB shares to Can-One International*.

APPLICATION FOR LEAVE

[97] On 18 March 2009, the appellants commenced legal proceedings against the liquidators, KCSSB, KPMG Peat Marwick and Can-One International at the Kuala Lumpur High Court Civil Suit No D8–22–505 of 2009 for various reliefs including damages for breach of fiduciary duties and fraud. And on 30 March 2009, the liquidators, KCSSB, KPMG Peat Marwick and Can-One International entered conditional appearances to the appellants' suit.

[98] In applying for leave to enter conditional appearances, both the liquidators and Can-One International relied on the ground that the appellants had not obtained prior leave of the court in commencing the Civil Suit No D8–22–505 of 2009 against the liquidators bearing in mind that the liquidators are officers of the court. So, to advance their cause, the liquidators, KCSSB, KPMG Peat Marwick and Can-One International respectively filed applications to strike out the appellants' suit.

[99] It is germane to mention that there is no provision in the Companies Act 1965 or the Companies (Winding-Up) Rules 1972 or the Rules of the High Court 1980 for the contributories to obtain leave of the court before commencing an action against the liquidators for torts as claimed in the Civil Suit D8–22–505 of 2009. In the alternative, in the event the appellants' suit is

struck out for want of leave, the appellants sought leave of this court to commence a fresh action against the liquidators, KCSSB, KPMG Peat Marwick and Can-One International for similar reliefs as claimed in the appellants' suit.

[100] Now, the requirement of obtaining leave prior to commencing an action against the liquidators is a requirement adopted in practice as is applied in cases where actions are commenced against liquidators or receivers appointed by the court and that leave can be obtained at any stage of the proceedings. And such leave is usually granted as a general rule and not as an exception. And everything would depend on the facts of the case. In *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567, certain companies sought leave of the court to initiate action against a liquidator for malicious prosecution and abuse of the process of the court, Kamalanathan Ratnam JC on the facts of the case declined to grant the leave and His Lordship explained the duties of a liquidator in this way:

> His task is an onerous one. He is charged with a number of statutory duties and he has a right to apply to court for directions and guidance. He is an officer of the court. He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might seek to level at him. He ought to be protected against such abuse unless there is sufficient prima facie evidence to support such allegations. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegations he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.

[101] In *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, Abu Mansor JCA (later FCJ) writing for this court was of the view that by virtue of s 226(3) of the Companies Act 1965, leave of the court was required before commencing the action against the liquidator. And that since no leave was obtained, the action was struck out. At p 207 of the report, this was what His Lordship said:

> At our resumed hearing, we struck off this appeal as we agreed with the learned judge that the motion, as such, in the first place, required the leave of the court before it could be brought but not for the reason found by the judge. Firstly, we read the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):
>
> > The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

A

> We are of the view from the above provision, it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him.

B

[102] Continuing at the same page, and taking the cue from the position of the receivers, this was what His Lordship said:

> We would cite the legal position of receivers who are in the same position as officers
C of court. In *The Law Relating to Receivers, Managers and Administrators* by Hubert Picarda at p 339, the learned author wrote:
>
> > A receiver, in the words of Viscount Haldane LC, 'is an officer of the court put in to discharge certain duties prescribed by the order appointing him'.... He is
> D 'nothing more than the hand of the court'.... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the court.
>
> E Then at p 373 of *Law of Receivers* by PS Atchuthen Pillai (2nd Ed), the author wrote in para 27:
>
> Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be dismissed ....
>
> F Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ....
>
> As we have stated we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a winding-up court has been
G that some form of leave is required.

[103] Be that as it may, on 1 September 2009, the learned judge of the High Court in Civil Suit No D8–22–505 of 2009 allowed the application made by
H the liquidators, KCSSB and KPMG Peat Marwick to strike out the said suit for want of leave.

WAS THERE A VALID OFFER FROM CAN-ONE INTERNATIONAL TO PURCHASE THE KJCFB SHARES?

I

[104] At the end of the open public tender exercise and on the revised deadline extended by the liquidators to 27 November 2008, three bids were received by the liquidators and they were from Can-One International, Gold Pomelo and Pembinaan Redzai Sdn Bhd.

[105] Gold Pomelo made a bid at the price of RM1.38 per share and had a confirmed letter of financing from Malayan Banking Bhd for the purchase of the KJCFB shares.

[106] It was submitted that the appellants were not aware of the terms of the purported offer advanced by Can-One International save that Can-One International did not have any financing available for the purchase of the KJCFB shares and should have been disqualified from the very beginning.

[107] At the fourth meeting of the contributories on 30 April 2009, the appellants managed to obtain a copy of the shares sale agreement dated 23 March 2009 between the company through the liquidators and Can-One International. And a copy of the shares sale agreement can be seen at pp 1593–1612 of the appeal record at Vol 20. There were two attachments to the shares sale agreement and that can be seen at pp 1613–1635 of the appeal record at Vol 20.

[108] At attachment two of the shares sale agreement at p 1622 of the appeal record at Vol 20, there is a letter from Can-One International addressed to the company for the attention of liquidator Ooi Woon Chee. That letter was dated 27 November 2008 carrying the following captions: ('Subject to Contract' and 'By Hand'). That letter was headed:

> Proposed acquisition of 153,868,617 ordinary shares of RM0.25 each in Kian Joo Can Factory Berhad ('KJCFB') ('Proposed Acquisition') via the Proposed acquisition of all the assets (inclusive of its shareholdings in all its subsidiaries and associated companies) and liabilities of KJCFB ('Proposed KJCFB Acquisition') — Offer.

[109] And going by that letter, Can-One International had not made the offer to purchase the KJCFB shares pursuant to the invitation by the liquidators in the public tender process but rather it was by way of the proposed acquisition of all assets (inclusive of its shareholdings in all its subsidiaries and associated companies) and liabilities of KJCFB as clearly stated in that letter.

[110] And in the appendix annexed to that letter, Can-One International categorically stated (see p 1623 of the appeal record at Vol 20):

> Our Company intends to acquire the effective interest of the 153,868,617 ordinary shares of RM0.25 each in Kian Joo Can Factory Berhad ('KJCFB') held by Kian Joo Holdings Sdn Bhd — In Liquidation via the proposed acquisition of all (and not part thereof) the assets (inclusive of its shareholdings in all its subsidiaries and associated companies) and liabilities of KJCFB ('Proposed KJCFB Acquisition').

[111] Thus, Can-One International intended to acquire all the assets (and not part thereof) and liabilities of KJCFB and all its subsidiaries and associated companies.

[112] It must be emphasised that KJCFB shares do not form part and parcel of the assets and liabilities of KJCFB. In fact, KJCFB shares are the assets of the company and not that of KJCFB. That being the case, even if Can-One International acquired the assets and liabilities of KJCFB, the KJCFB shares would still remain in the portfolio of the company. Consequently, Can-One International would have only acquired the assets and liabilities of KJCFB and leaving KJCFB without any assets or liabilities. That being the case, it is our judgment that it is an open question as to whether there was an offer from Can-One International to purchase the KJCFB shares.

[113] Again, in the appendix as seen at p 1623 of the appeal record at Vol 20, Can-One International clearly stated that:

> The Proposed KJCFB Acquisition will be funded by cash for a purchase consideration of RM666,251,679 (Ringgit Malaysia: Six Hundred Sixty Six Million Two Hundred Fifty One Thousand Six Hundred and Seventy Nine Only). Based on the issued and paid-up capital of 444,167,786 KJCFB shares, this equates to RM1.50 (Ringgit Malaysia: One and Sen Fifty) per KJCFB share.

[114] So it can be surmised that that letter — referring to the letter of 27 November 2008 from Can-One International to the liquidators of the company, was not for the purchase of the KJCFB shares but rather it was for the purchase of the entire assets and liabilities of KJCFB and all its subsidiaries and associated companies — lock stock and barrel, so to speak.

[115] We pause here for a moment in order to make the following observation. The purported offer made by Can-One International for the purchase of the KJCFB shares was made on an assumptive basis, as Can-One International had clearly stated in the appendix at p 1623 of the appeal record at Vol 20 that:

> Based on the Proposed KJCFB Acquisition proceeds and assuming a full capital distribution of the proceeds be made, the value of the 153,868,617 ordinary shares of RM0.25 each in KJCFB held by Kian Joo Holdings Sdn Bhd — In Liquidation is as follows:
>
> No: of KJCFB shares proposed to be acquired 153,868,617
>
> Indicative price offer per KJCFB shares RM1.50
>
> Indicative price offer for KJCFB shares RM230,802,925.50.

[116] It cannot be denied that the purported offer made by Can-One International was subject to the intended acquisition of Can-One International of all the assets of KJCFB and was on the assumption that a full capital distribution of the proceeds be made. In this letter dated 27 November 2008, Can-One International had clearly stated that the indicative price for the KJCFB shares was based on the proposed KJCFB acquisition proceeds and on the assumption that a full capital distribution of the proceeds be made. It is our judgment that the letter dated 27 November 2008 was based merely on the indicative price and based on the assumption of Can-One International, and therefore it was not without merit for us to say that that was not a firm and valid offer to purchase the KJCFB shares.

[117] Another pertinent point to note would be this. That Can-One International cannot make any offer for the acquisition off all the assets and liabilities of KJCFB to the liquidators of the company for the simple reason that the company merely owns 153,868,617 ordinary shares of RM0.25 each in KJCFB. That calls into question the power of the liquidators to receive or even consider the purported offer of Can-One International.

[118] By way of a letter dated 19 January 2009, Can-One International purportedly submitted a revised offer for the acquisition of the KJCFB shares. Once again, the offer was made for the purchase of the entire assets and liabilities of KJCFB for a revised sum of RM732,876,846.90 which was at RM1.65 per KJCFB shares. In this very letter too, Can-One International categorically stated that the revised indicative price for the KJCFB shares was based on the proposed KJCFB acquisition proceeds and also purely on the assumption that a full capital distribution of the proceeds be made.

[119] It must be recalled that the liquidators set the terms and conditions for all the bidders to follow. They may be stated as follows:

(a) The offer to be submitted in accordance with all the instructions set out in the open public tender exercise.

(b) The offer should reflect a single amount and it should not consist of a range of amounts and the offer must follow the format set by the liquidators.

(c) If a third party financing is required, the bidder should enclose the letter of support from the third party financier.

(d) The offer should be submitted together with the draft sale and purchase agreement provided by the liquidators. And that draft sale and purchase agreement must be marked up.

[120] Bearing in mind these four salient terms and conditions set by the liquidators, we will now make specific references to the purported offers by Can-One International.

[121] The first purported offer by Can-One International was dated 27 November 2008. This offer was to acquire the entire assets and liabilities of KJCFB including all its subsidiaries and associated companies for the sum of RM666,251,679 for 444,167,786 of KJCFB shares at RM1.50 per share. This offer was premised on the proposed KJCFB acquisition proceeds and assuming full capital distribution. In our judgment, it must be asked whether that offer complied with what was offered, which was 153,868,617 KJCFB shares comprising of 34.64% of the equity of KJCFB, when given the fact that there was no letter from the financier supporting the offer of Can-One International.

[122] The second purported offer by Can-One International was dated 19 January 2009. This offer was just like the first purported offer but with a bigger financial margin at RM732,876,846.90 for 444,167,786 of KJCFB shares at RM1.50 per share. Again it ought to be asked as to whether the liquidators had the powers to accept that offer.

[123] There was also a proposed alternative offer by Can-One International to acquire all of 153,868,617 KJCFB shares at RM1.65 per share for the sum of RM253,883,218.05. But again it could be debated that it was not a valid offer, as there was no definitive letter of support from a financier, nor was there a marked draft sale and purchase agreement, and that the liquidators should therefore have rejected this offer.

[124] The third purported offer by Can-One International was dated 20 February 2009. It was to acquire 146,131,500 KJCFB shares for RM241,116,975. For the very first time the marked draft sale and purchase agreement was enclosed after about three months from the original deadline of 27 November 2008. It is also compounded by the absence of a definitive letter of support from a financier.

[125] Through their previous solicitors Messrs Lee Hishamuddin Allen & Gledhill, the liquidators had on 23 February 2009 accepted the conditional offer made by Can-One International to purchase KJCFB shares. However, the deadline for the acceptance of the offers was on 20 February 2009. So, was the liquidators' acceptance of the offer on 23 February 2009, after the expiry of the deadline on 20 February 2009 valid?

[126] On the available evidence, we conclude that there were yet questions:

(a) on the validity of offer from Can-One International for the purchase of the KJCFB shares;

(b) on whether the purported offer from Can-One International was for the acquisition of all the assets and liabilities of KJCFB and all its subsidiaries and associated companies and whether the liquidators had the powers to consider such an offer;

(c) on whether at the very outset the liquidators should have disqualified and rejected Can-One International's purported offer; and

(d) on whether Can-One International was the successful bidder for the purchase of the KJCFB shares.

BREACHES OF FIDUCIARY DUTIES BY THE LIQUIDATORS — CONFLICT OF INTEREST SITUATION

[127] From the facts as narrated, we cannot categorically say that the liquidators had not acted in breach of fiduciary duties owed to the appellants and or that the entire public tender exercise was so tainted as it were with conflict of interests and fraud.

[128] It cannot be denied that the liquidators, KCSSB and KPMG Peat Marwick are trustees and agents of the company and/or the appellants in relation to the KJCFB shares where the appellants as the contributories are the beneficial owners of the KJCFB shares in the liquidation exercise of the company.

[129] From the facts, it is quite apparent that the liquidators of the company and KCSSB and KPMG Peat Marwick are the vehicles and/or entities used by the liquidators and KPMG Peat Marwick whom the liquidators represent as partners and the contributories of the company have placed themselves in a fiduciary relationship with each other.

[130] On the facts, it is our judgment that the liquidators, KCSSB and KPMG Peat Marwick could have breached their fiduciary duties owed to the appellants. We now set out the particulars of the fiduciary duties breached by the liquidators, KCSSB and KPMG Peat Marwick:

(a) The liquidators, being officers of the court, entrusted to safeguard the reputation of the court and owing fiduciary duties to the appellants were required to act with complete impartiality, independence and transparency in conducting and discharging their duties.

(b) The liquidators, KCSSB and KPMG Peat Marwick, could not act in breach of their fiduciary duties or in conflict of interests.

(c) KPMG Peat Marwick, in which the liquidators are the partners, are the auditors acting for and on behalf of Can-One International to whom

A the liquidators, KCSSB and KPMG Peat Marwick awarded the successful bid to purchase the KJCFB shares and its parent company, Can-One Bhd.

(d) KPMG Peat Marwick were the reporting accountants for Can-One International's parent company, Can-One Bhd, in respect of its public listing exercise on the main board of Bursa Malaysia. The liquidators are the partners of KPMG Peat Marwick.

(e) KPMG Peat Marwick, in which the liquidators are the partners, received and still continue to receive financial remuneration from Can-One International and its parent company, Can-One Bhd, in respect of the auditing and/or accounting services rendered by KPMG Peat Marwick to Can-One International and Can-One Bhd. So the liquidators as partners of KPMG Peat Marwick receive pecuniary benefit from Can-One International and Can-One Bhd by virtue of Can-One International and Can-One Bhd being the clients of KPMG Peat Marwick as alluded to above.

(f) The liquidators, KCSSB and KPMG Peat Marwick as trustees and agents of the company and/or the contributories of the company are required to act in the best interests of the company as well as for the appellants who are the contributories in respect of the proposed sale of the KJCFB shares.

(g) The liquidators, KCSSB and KPMG Peat Marwick were custodians of the interest of the company and the appellants as the contributories on the one hand and the interest of Can-One International and Can-One Bhd on the other hand.

(h) The liquidators, KCSSB and KPMG Peat Marwick had only themselves to be blamed for being in a position of possible conflict of interest where their confidence, trust and loyalty to Can-One International and Can-One Bhd from whom they have received and continue to receive pecuniary benefits could conflict with their duties as officers of the court and/or their duties owed to the appellants as the contributories and/or the company as alluded to above, for which the liquidators, KCSSB and KPMG Peat Marwick also received and continued to receive financial remuneration.

(i) On the facts, it remained to be answered as to whether the liquidators, KCSSB and KPMG Peat Marwick had suppressed and concealed their conflict of interest.

(j) Because of the possible conflict of interest of the liquidators, KCSSB and KPMG Peat Marwick as alluded to above and the failure to fully disclose the conflict of interest to the appellants as the contributories, it could be asked as to whether the entire public tender process for the

sale of the KJCFB shares and the subsequent award of the bid to Can-One International is tainted and infected with the conflict of interest element and it is biased, illegal, null and void.

(k) From the facts, it could not be ruled out that the liquidators, KCSSB and KPMG Peat Marwick had acted in conflict of interest for their own benefit and for the benefit of their existing clients, Can-One International and its parent company, Can-One Bhd.

[131] At this juncture, it is ideal to state the general rules and principles governing fiduciary obligations. There is a class of fiduciaries. It is comprised of persons who have been entrusted with powers for the benefit of others, but who in the exercise of those powers are not subject to the direct and immediate control of the others. Company directors, trustees, executors, trustees in bankruptcy, court appointed liquidators and receivers are the more notable members of this class. They enjoy the freedom in their decision making, and the lack of direct control by their respective beneficiaries has attracted equity's supervision.

[132] However, the general fiduciary obligation imposed on such beneficiaries sets the boundaries to their freedom within their powers. This general obligation in practice does little more than simply to describe compendiously a series of quite specific duties which prescribe in detail what the fiduciary must or must not do if he is to serve those interests properly. Hopefully, these duties will ensure that when a decision is made it is in fact made by the fiduciary, and that it is made because he believes it should be made, and that it is made in the interests of his beneficiaries.

[133] Cardozo J in *Morton H Meinhard v Walter J Salmon et al* 249 NY 458 (1928) at p 464; 164 NE 545 (1928) at p 546 aptly said:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate.

[134] The court has to ensure that a person who has had trust or confidence reposed in him by another, does not abuse that trust or confidence either for his own benefit or to the detriment of that other relying upon him. A classic example would be the trustee or even the agent — they have long felt the force of equity's dictates of 'conscience' upon them.

[135] Examples of persons who are 'bound by fiduciary ties' or exercising the duties of good faith are manifold. Some are well known, like for example, the

rules of undue influence and the rule which prohibits a person in a fiduciary position from allowing any undisclosed personal interest to come into conflict with his duties. But there are some other less well known and less well defined, such as, the rule which regulates the purchase of shares by persons who have acted in a confidential position in relation to that shares, or the rule which safeguards the interests of persons who communicate secrets to others in the confidence that those secrets will be kept. Thus, it can be surmised that the duties of good faith are designed to ensure that positions of 'trust', or of 'confidence', or of 'influence' as the case may be, are not abused. And each duty exacts its own standard of acceptable conduct from the fiduciary to whom it applies. Thus, a person will not permit another person to use or to disclose information imparted to him in confidence without the consent of the person who disclosed it to him. Yet another rule is this. It prohibits a person who has undertaken to act on behalf of one 'principal' in some matter from accepting a second and inconsistent engagement in the same matter from another 'principal' without the informed consent of both 'principals'.

[136] A person is said to be a fiduciary when he has bound himself in some way to protect and/or to advance the interests of another. Thus, when such a position has been assumed by one party to any legal relationship then that party's position is potentially a fiduciary one. In *National Trustees, Executors & Agency Co of Australasia Ltd v Boyd* (1926) 39 CLR 72 at p 81, it was held that there could be nothing fiduciary in the position of a wife in relation to a special leasing power conferred on her by a deed of family arrangement as this power was hers to be used for her own benefit and was not given so that she might exercise a discretion in the interest of others as well as herself.

[137] Thus, for a position to be fiduciary it must exist for the benefit of another.

[138] Then there is a situation where a person, while acting for or on behalf of another, does not derive his duties and powers from an agreement with that other but derives them from an independent source. For example, a liquidator derives his powers from the Companies Act 1965. And a court appointed receiver in a debenture holder's action acts under the order of the court, and not by agreement with the debenture holders or the company. A trustee's powers and duties stem from the trust instrument, statute and the general law, and not from an agreement with the beneficiaries. The same would also be true of personal representatives, boards of directors, tenants for life, trustees in bankruptcy, and the managers and trustees of unit trusts.

[139] As a general rule, it is the province of the fiduciary to determine what actions are in the interests of his beneficiaries. The courts are not entrusted with this decision. On the other hand, it is the province of the courts to determine

what actions are not in the beneficiaries' interest, and an action will not be in the beneficiaries' interest if it constitutes a breach of any of the specific duties.

[140] The roles of the fiduciary and of the courts are not altogether mutually exclusive. Many fiduciaries have the right to apply to the court for guidance as to how a discretion can properly be exercised in a particular instance as is the case with, for example, trustees, personal representatives, trustees in bankruptcy, liquidators and receivers. The courts will not, however, permit a fiduciary to use this right as a means for surrendering his discretions to the court (*In re Allen-Meyrick's Will Trusts; Mangnall v Allen-Meyrick and others* [1966] 1 WLR 499).

[141] The courts have imposed a general obligation on fiduciaries. An obligation generally to act 'in the interests of' or 'for the benefit of' their fiduciaries. The exertions of the fiduciary must be directed to the service of his beneficiaries' interests.

[142] Under the umbrella of the general obligation, the duties of the fiduciaries may be divided into two groups. The first group serves to bind the fiduciary to the discretions of his office. They are purely designed to ensure that there will be no failure on his part to exercise those discretions. The duties of the first group may conveniently be stated as follows:

(a) a duty not to delegate discretions;

(b) a duty not to act at the behest or under another's dictation;

(c) duty not to place 'fetters' on discretions; and

(d) a duty to consider wisely whether a discretion should be exercised.

[143] The second group, on the other hand, binds the fiduciary in the actual exercise of his discretions. The duties of the second group are as follows:

(a) a duty not to act for his own benefit;

(b) a duty not to act for the benefit of any third party;

(c) a duty to treat beneficiaries equally where they have similar rights;

(d) a duty not to act capriciously; and

(e) a duty not to act unreasonably.

[144] At the end of the day, a fiduciary must act honestly bearing in mind that whatever he does it will always be subject to scrutiny. The court's concern is to ensure that if and when choices are to be made, they will be made by the fiduciary, and it will be made for and in the beneficiaries' interests.

[145] If a fiduciary is to act and is required to act fairly he must not be handicapped at the time of his appointment. Notwithstanding the personal competence and expertise of the fiduciary, he may be personally so circumstanced as to render himself totally unsuitable to hold the fiduciary office. Thus, it would be inappropriate for the court to appoint as a receiver in an action the solicitor of the party having the carriage of the action (*In re Lloyd; Allen v Lloyd* (1879) 12 Ch D 447). Similarly inclined would be a person with declared views favourable to one class of the beneficiaries of a trust is an unsuitable appointee as trustee (*In re Tempest* (1866) LR 1 Ch App 485 at pp 488–490). Equally disqualified would be an accounting party to a bankrupt if appointed as trustee in bankruptcy could not adjudicate disinterestedly upon accounts rendered by himself (*In re Beale (RGF); Ex parte The Board of Trade* [1939] Ch 761). Likewise here, the liquidators who are the partners of KPMG Peat Marwick should not have been appointed as the liquidators of the company.

[146] Lord Herschell in *George Bray v John Rawlinson Ford* [1896] AC 44 at p 51, aptly said:

> It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.

[147] In *Boardman and another v Phipps* [1967] 2 AC 46 at p 123, Lord Upjohn in his dissenting speech observed that the rules of equity have to be applied to such a diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.

[148] Lord Wilberforce in *New Zealand Netherlands Society 'Oranje' Incorporated v Laurentius Cornelis Kuys and another* [1973] 1 WLR 1126 at p 1129, expressed his opinion in this way:

> The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest is one of strictness.

[149] And Lord Upjohn's description of this fundamental rule in *Boardman and another v Phipps* is quite apt. This was what His Lordship said (see p 123):

> ... a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and interest may conflict.

[150] On the authority of *Armstrong v Jackson* [1917] 2 KB 822, it is correct to say that the objectives of conflict of duty and interest are twofold. The first is this. It is to prevent a person who has undertaken to act for or on behalf of another in some matter from allowing any undisclosed personal interest to sway him from the proper performance of that undertaking. It is this wrongdoing that puts to the forefront the idea of a conflict of duty (undertaking) and interest. A classic example would be the rule which forbids an agent to purchase, from being the undisclosed vendor.

[151] The second objective is this. That it is to prevent a person from actually misusing the position his undertaking gives him to further his own interests. This would be in the realm of profiting from a position of trust and it is exemplified by a partner misusing the business connection of the partnership to his own advantage (*Russell v Austwick* (1826) 1 Sim 52).

[152] Why must we have this rule of the conflict of duty and interest? The answer has been advanced by Lord Herschell in *George Bray v John Rawlinson Ford* at pp 51–52, in this way:

> It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.

[153] A fiduciary is someone who undertakes to act for or on behalf of another in some particular matter or matters. The undertaking is of a general character. It may be specific and limited. It is immaterial whether the undertaking is captured in a contract or not. It is immaterial that the undertaking may be gratuitous. It is immaterial that the undertaking may be assumed without request.

[154] Some legal principles need to be emphasised. The headnote to the case of *In re R Gertzenstein, Limited* [1937] Ch 115 reads as follows:

> There is a fiduciary relationship between the liquidator on the one side and the shareholders of creditors of the company on the other.

[155] In *Coats & Ors v Southern Cross Airlines Holdings Ltd (in liq) & Anor* at p 1399, Fitzgerald P aptly said:

> A liquidator must act in the interests of contributories only in and for the purposes of the winding up.

[156] Lord Davey in *Kent and others, liquidators of La Banque Ville-Marie v La Communaute Des Soeurs De Charite De La Providence and others; on appeal from the Court of King's Bench for the Province of Quebec (appeal side)* [1903] AC 220 (PC) at p 226, described the office of the liquidator in this way:

> The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories.

[157] In *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd and others* (1997) 144 ALR 159 at p 163, Tamberlin J referred to a liquidator as a hybrid composite of a fiduciary, trustee and agent in this way:

> Liquidator — nature of the office
>
> The office of a person appointed liquidator to a corporation, does not fit any precise legal category or classification, which defines the rights and liabilities, attaching to that office. It is a hybrid composite with elements of fiduciary, trustee, agent, officer of the corporation and (in some instances) 'officer' of the court. Attached to those elements are the obligations along with the powers and discretions which apply to those roles. The liquidator's office is decribed in *Loose on Liquidators*, (1989, 3rd Ed) at p 13 as:
>
> > ... a cross between a trustee and an agent or, alternatively, like the directors, whose powers terminate upon the commencement of a winding-up, as a fiduciary agent of the company. Thus a liquidator must not only act bona fide and reasonably and exercise his powers for their proper purposes only but must also exercise reasonable care and skill in the performance of his duties. Failure to exercise the necessary degree of skill and care may inter alia deprive him of his costs.
> >
> > A liquidator is also under a fiduciary duty in respect of the assets of the company of which he is appointed. As such he should not purchase assets of the company. Similarly, a liquidator may be required to disgorge any secret profit made... in consequence of... his office as liquidator and transaction with an associate may be set aside ....
> >
> > The liquidator differs from the normal agent, however, in that he himself controls the actions of his principal, ie the company. Furthermore his duties as agent of the company are subject to his overriding statutory duties to apply the company's assets in paying creditors and to distribute any surplus among the members.

A similar description is contained in *Palmer's Company Law Service* (published by Sweet and Maxwell at pp 15128–15132).

[158] Thus, it can be surmised that the liquidators of the company are a fiduciary, a trustee, an agent and also an officer of the court.

[159] Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at pp 18–19, described the conflict of interest and breach of fiduciary duties in this way:

> A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other: see *Clark Boyce v Mouat* [1994] 1 AC 428 and the cases there cited. This is sometimes described as 'the double employment rule'. Breach of the rule automatically constitutes a breach of fiduciary duty.

THE ADMITTED FACTS BEFORE THE HIGH COURT

[160] The available affidavit evidence shows that both the liquidators and Can-One International admitted that:

(a) The liquidators are the partners of KPMG Peat Marwick and that KPMG Peat Marwick are the auditors and/or the reporting accountants to Can-One International and Can-One Bhd.

(b) KPMG Peat Marwick are still continuing as the auditors for Can-One International and Can-One Bhd. There was and there still is an existing auditor-client relationship between KPMG Peat Marwick and Can-One International and Can-One Bhd.

(c) KPMG Peat Marwick are paid auditing fees by Can-One International and Can-One Bhd. Thus, there is a direct pecuniary relationship between KPMG Peat Marwick and Can-One International and Can-One Bhd. And however small or nominal the financial remuneration, that raises the question of the disqualification of the liquidators to determine on the fate of the bid of their client.

(d) Can-One International admitted that KPMG Peat Marwick receives from Can-One International the annual fees of RM1,000 per year for audit work performed by KPMG Peat Marwick.

(e) Can-One Bhd also admitted that it had paid to KPMG Peat Marwick the sum of RM18,000 and RM17,000 respectively for the financial years 2007 and 2008 for audit work performed by KPMG Peat Marwick.

(f) Without a doubt, there was the possibility of a conflict of interest situation that cannot be swept under the carpet.

MISDIRECTIONS BY THE LEARNED JC

[161] The learned JC made a finding that the appellants had made blanket

allegations of conflict of interest against the liquidators and KPMG Peat Marwick. At pp 232A–233A of the appeal record at Vol 3, the learned JC held as follows:

> In the instant case the majority contributories have made what amount to blanket allegations of conflict of interest against the Liquidators as well as KPMG, the firm in which they are partners as well as KCSSB.

[162] The learned JC arrived at this finding without evaluating the evidence on the record and even before considering the rival submissions of the parties. The evidence on record shows that the appellants had not made mere averments of conflict of interest against the liquidators and KPMG Peat Marwick. The admitted facts as produced earlier shows that KPMG Peat Marwick in which the liquidators are partners are the auditors for both Can-One International and Can-One Bhd and KPMG Peat Marwick still continue to receive financial remuneration from them. We hold that once it is shown that there is any pecuniary relationship between the liquidators and their firm KPMG Peat Marwick in which they are partners, together with Can-One International and Can-One Bhd, there is an automatic disqualification in law and the liquidators are disqualified from considering and awarding the bid to their client and paymaster. It makes not a whit of a difference whether the financial remuneration is small or nominal. As Blackburn J said in *The Queen v Rand and others* (1865–66) LR 1 QB 230 at p 232 that:

> There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; ....

[163] We must highlight that the appellants had deposed in their affidavit affirmed on 15 June 2009, the material facts involving the liquidators, KCSSB and KPMG Peat Marwick in the entire liquidation exercise of the company. We say that these material facts were unrebutted. Briefly, we will summarise them as follows:

(a) It was the contributories who first recommended KPMG Peat Marwick because at the time of the recommendation there was no conflict of interest.

(b) The contributories did not know about the liquidators at all. They were only dealing with KPMG Peat Marwick. It was KPMG Peat Marwick who nominated and put in their men as the liquidators because the liquidators were partners of KPMG Peat Marwick and KCSSB.

(c) It must be recalled that the High Court order appointing the liquidators and the subsequent order appointing the replacement liquidator made specific reference to KPMG Peat Marwick and KCSSB.

(d) And the correspondence by the liquidators on their appointment on 30 January 1996 with the directors of the company and/or the contributories was under the letterhead of KPMG Peat Marwick.

(e) The liquidators proceeded to distribute their business calling cards bearing the name of KPMG Peat Marwick.

(f) In the course of their work, the liquidators delegated various tasks and duties to the employees of KPMG Peat Marwick and/or KCSSB.

(g) Of significance is this. That all payments and advances for the liquidators' services were paid to KPMG Peat Marwick or KCSSB.

(h) All advertisements inserted by the liquidators, prominently and publicly displayed the names of KPMG Peat Marwick and/or KCSSB.

(i) All meetings except the two private and secret meetings were held at the office of KPMG Peat Marwick.

(j) The liquidators' statutory reports were filed by KCSSB.

(k) The liquidators had announced and made it loud and clear to all the contributories that they were not acting alone and that they were supported by various team members of KPMG Peat Marwick in the liquidation process of the company.

(l) That both KCSSB and KPMG Peat Marwick are the corporate vehicles and/or entities used by the liquidators in carrying out their obligations and duties as the liquidators of the company.

[164] As demonstrated above, the liquidators, KCSSB and KPMG Peat Marwick are inextricably linked, intertwined, and involved in the entire liquidation process of the company.

[165] We now know that the liquidators are KPMG Peat Marwick and/or KCSSB's men. Once KPMG Peat Marwick and/or KCSSB's put their men in as liquidators of the company, KPMG Peat Marwick and/or KCSSB owed a duty *to the contributories as beneficiaries of the assets of the company*. In *Kyrris v Oldham* [2004] BCC 111, Jonathan Parker LJ speaking for the Court of Appeal aptly said at p 148 of the report:

161. Returning to the judgment of Jacob J in *A & J Fabrications*, after referring to *Pulsford v Devenish and James Smith* and to s 143 of the 1986 Act, Jacob J continued (at p 812):

> Given there is a duty on these liquidators to get the money in, there was a duty to investigate what money could be got in. The pleading says they failed in that duty; in particular, they failed to keep the plaintiffs informed of the state of their investigations, and did so for such a long time that any possibility of a claim became statute barred.

(Counsel for Grant Thornton) says, again, that the plaintiffs have got the wrong party. If there was a duty at all in tort it was a duty on the individual liquidators, and they should be the defendants. No doubt they could be, but it seems to me that once those defendants were put in as Grant Thornton men, Grant Thornton owed a duty coterminous and dependent upon the duties of the individual liquidators to these plaintiffs.

161. Jacob J then turned to s 212, concluding (at pp 812–813) that there was no reason why the statutory remedy under s 212 should in any way exclude common law remedies in contract or tort. He concluded his judgment by saying:

> Those who undertake the task of being liquidators should reasonably expect to have to do their job properly, and should reasonably expect that if they do not do so they are answerable to those ultimately for whom they are acting, namely the creditors.

[166] The crucial question to pose would be whether the liquidators had placed themselves in a position of conflict of interest and/or had acted in conflict of interest in receiving, evaluating and accepting the purported offers by Can-One International in the public tender process when Can-One International and its parent company Can-One Bhd are the clients and paymasters of the liquidators? It must be acknowledged that the pecuniary remunerations received and continued to be received by KPMG Peat Marwick for auditing and accounting services provided by KPMG Peat Marwick to Can-One International and Can-One Bhd cannot be denied. These pecuniary remunerations would also benefit the liquidators because they are the partners of KPMG Peat Marwick.

[167] Now, the learned JC made the following findings in order to support her decision that there was no conflict of interest:

(a) According to the learned JC the fact that the liquidators are the partners of KPMG Peat Marwick does not amount to conflict of interest because the liquidators although partners of KPMG Peat Marwick, are separate entities.

(b) The learned JC then proceeded to say that if the question is put in this way and by applying the principles enunciated in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 (HL); *Deloitte & Touche AG v Johnson*

[2000] 1 BCLC 485 (PC) and *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 (HL), it cannot be said that the liquidators have acted or placed themselves in a position of conflict of interest. The relevant passages in the judgment of the learned JC can be seen at pp 233A–234A of the appeal record at Vol 3 and they are worded as follows:

> The appointment of the liquidators it must first be noted, as pointed out by learned counsel for the liquidators and Can-One International, is personal in nature, as evidenced by ss 4 and 8 of the Companies Act 1965. Both sections make reference to persons, not a firm nor a company. As such only Ooi Woon Chee and Ng Kim Tuck (a somewhat self-evident fact) are the liquidators, not KPMG nor KCSSB. The latter two entities cannot be appointed liquidators, and the fact that Ooi Woon Chee and Ng Kim Tuck are partners of KPMG does not and cannot make the firm and the company liquidators. They remain separate entities. Given this, can it be said that the liquidators have without the consent of two 'clients' namely the company and Can-One acted for the company while their partners in KPMG have acted for Can-One in the opposite interest? Or that Ooi Woon Chee and Ng Kim Tuck are fiduciaries who have acted at the same time both for and against the same 'client'?
>
> It is immediately clear when the question is put this way, in the context of the principles set out in the aforesaid cases, that it cannot be said that the liquidators have acted or placed themselves in a position of conflict of interest. The liquidators were not acting at the same time for the majority contributories as well as Can-One 'in the opposite interest'. The liquidators were at all times acting for the company, as a consequence of which, at best they are in a quasi-trustee position vis a vis the contributories.

[168] The learned JC even ventured to hold that there is no nexus between the audit work done by KPMG Peat Marwick for Can-One International and the 2008 open public tender process for the sale of the KJFCB shares. At p 234A of the appeal record at Vol 3, this was what the learned JC said:

> In any event as an audit client of KPMG, it cannot be said that Ooi Woon Chee and Ng Kim Tuck are acting for Can-One as well as the company in the opposite interest as described in the *Prince Jefri Bokiah* case (above). This is because there is no nexus between the audit work done by KPMG for Can-One International and the 2008 sale which deals with the realisation of the assets of the company in liquidation.

[169] Continuing further at pp 235A–236A of the appeal record at Vol 3, the learned JC had this to say:

> As for KPMG the firm, it is not the liquidator. The individuals Ooi Woon Chee and Ng Kim Tuck are the liquidators. So KPMG and KCSSB cannot and have not placed themselves in any sort of 'position' in relation to the 2008 sale. Neither KPMG nor

KCSSB have any nexus with the 2008 sale, nor any duty fiduciary or otherwise to the company. Neither has KPMG nor KCSSB acted 'against' or in the opposite interest of the company by auditing the accounts of Can-One International.

It cannot be underscored sufficiently that Ooi Woon Chee and Ng Kim Tuck were personally appointed as liquidators of the company. The distinction between these individuals and KPMG and KCSSB is crucial in analysing the allegations of a conflict of interest. Such distinction cannot be blurred or obscured so as to bring KPMG and KCSSB into the 2008 sale, or to impose fiduciary positions onto these entities. The fact that the individuals are partners in those entities does not allow for such confusion.

[170] The learned JC seems to be influenced by the fact that the liquidators procured the highest possible price for the KJCFB shares. This was how the learned JC puts it (see p 235A of the appeal record at Vol 3):

How have the liquidators placed themselves in a conflict of interest position? By receipt of pecuniary benefit as a consequence of being partners of KPMG who audit Can-One International's accounts? In other words, did the fact that they, in their capacity as partners of KPMG, who received and continue to receive a part of the remuneration paid by Can-One to KPMG as audit fees, affect or influence in any way their duty to the company to obtain the best possible price for the KJCFB shares? The fact that the liquidators procured the highest possible price available for the KJCFB shares in itself puts paid to this contention.

[171] With respect, this is an erroneous finding and a clear misdirection by the learned JC based on a misreading and misapplication of the very authorities relied upon by her.

[172] It is ideal to refer to the case of *Prince Jefri Bolkiah v KPMG (a firm)* especially at pp 234–235 of the judgment of Lord Millett:

... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

[173] It is certainly a passage worth referring to. It makes it crystal clear that the partner's firm is in no better position than the partner himself. And even if the liquidators as partners of KPMG Peat Marwick are not directly doing the auditing work for Can-One International and its parent company Can-One Bhd, the very fact that the other fellow partners of the liquidators in KPMG Peat Marwick are doing the auditing work automatically creates a conflict of interest situation and, consequently, the consent of both clients must be

obtained. This reasonable approach is based on the inescapable conflict of interest which is inherent in the circumstances of the case.

[174] Lord Millett in *Deloitte & Touch AG v Johnson* at p 492 gave meaning to the expression 'conflict on interest' in this way:

> Their Lordships observe that the expression 'conflict of interest' is an abbreviation for 'conflict of interest and duty'. The rule is that a fiduciary may not without the informed consent of his principal place himself in a position where his interest may conflict with his duty to the principal. The danger is that his interest may affect him in the discharge of his duty to the prejudice of his principal.

[175] And what Lord Millett said in *Deloitte & Touch AG v Johnson* when applied to the present appeal would show that the liquidators have not only placed themselves where their interest may conflict with their duty but had in actual fact proceeded further and completed the act by actually acting in conflict of interest and awarding the bid to their client and paymaster Can-One International.

[176] The learned JC too has misunderstood the facts and the principles of law involved in the case of *Cobrico Developments Inc v Tucker Industries Inc et al* 2000 ABQB 766 with the result that she has erroneously held that the general position in the Cobrico case was applicable to the facts of the liquidators in the present appeal and she further held that it does not warrant the inference of any form of conflict of interest on the part of the liquidators.

[177] The liquidators relied on the *Cobrico* case and argued that there was nothing wrong in the conflict of interest situation and the learned JC accepted the argument without venturing to analyse and understand the *Cobrico* case.

[178] Briefly, *Cobrico* case involved the appointment of an auction house to dispose of the debtor's estate. There were three auction houses approached by the receiver/manager and All Peace Auction Ltd was the successful auction house chosen by the receiver/manager. Ritchie Bros, being the unsuccessful auction house lodged a complaint. Whereas in our present appeal, we are not dealing with an appointment of auction houses by the liquidators and, consequently, we say that *Cobrico* case is completely irrelevant and should not be referred to at all.

[179] Now, the conflict of interest referred to in the case of *Cobrico* was the alleged conflict of interest between the receiver/manager and the auction house. The *Cobrico* case was concerned with employing the services of experts by the receiver/manager. It was to employ the service of the auction house to

dispose of the debtor's estate. In sharp contrast, in our present appeal, we are not concerned with employing experts by the liquidators to dispose of the KJCFB shares.

[180] We note that the *Cobrico* case does not involve a conflict of interest situation between the liquidators and their accounting firm who are the auditors for their clients and the liquidators proceeded to award the bid to their client who is their paymaster.

[181] The finding of the learned JC that the liquidators had procured the highest possible price for the KJCFB shares shows that there is no conflict of interest is, with respect, against the weight of authority. It is the law that the liquidators as trustees and fiduciaries should be financially disinterested in carrying out their duties. It is also the law that the liquidators should not put themselves in a position where their duty and interest conflict and it is entirely irrelevant whether any loss was suffered by the impugned transaction. Lord Nicholls of Birkenhead in *Attorney General v Blake (Jonathan Cape Ltd Third Party)* aptly said at p 280:

> Breach of trust and fiduciary duty
>
> I should refer briefly to breach of trust and breach of fiduciary duty. Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position where their duty and interest conflict. To this end they must not make any unauthorised profit. If they do, they are accountable. Whether the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant. The accountability of the army sergeant in *Reading v Attorney-General* [1951] AC 507 is a familiar application of this principle to a servant of the Crown.

[182] The width and pith of the conflicts rule cannot be doubted. It is universal in its application. It receives its affirmation by Lord Cranworth LC in *Aberdeen Rail Co v Blaikie Brothers* [1843–60] All ER Rep 249 at p 252 in these words:

> This, therefore, brings us to the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.

> So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui qua trust which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

[183] Some general statements of the law in regard to the issue of a conflict of interest should be advanced, namely:

(a) It must be remembered that it is 'an inflexible rule of a court of equity' (*George Bray v John Rawlinson Ford* at p 51).

(b) The law requires that there is a reasonable perception of a conflict of interest arising bearing in mind that it is difficult to determine whether a genuine conflict of interest has occurred.

(c) The remoteness of the possibility of a genuine conflict of interest is not a relevant consideration to determine the liability of a fiduciary.

(d) The duty of disclosure falls on the fiduciary. The fiduciary must disclose his personal interest as soon as a possible conflict arises, or as soon after as is practicable.

(e) The law targets against potential conflict of interest as well as actual conflict of interest.

[184] Here, before us, there was not just potential conflict of interest but also actual conflict of interest as well as a direct pecuniary relationship between the liquidators and Can-One International.

[185] We venture to say that the decision of the learned JC that there was no conflict of interest by the liquidators in receiving, considering and awarding the bid to Can-One International who was their client and paymaster is fundamentally flawed. It constitutes a very serious misdirection that allows for appellate intervention.

[186] Mohamed Dzaiddin Abdullah FCJ (later Chief Justice of Malaysia) in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC) aptly said at at pp 527–528 (MLJ) and pp 175–176 (CLJ):

> Relevant Principles of Law
>
> In the light of the above findings of the learned judge, a fundamental question of principle arises, which is, whether in the circumstances of the case, this court can interfere with the findings of fact of the court below. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd and others v Veitch and another)* [1942] 1 All ER 142 (HL) per Lord Porter at p 167. However, the authority for the above proposition is the speech of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484, particularly the following passage (at pp 487–488):
>
> I Where a question of fact has been tried by judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> *Thomas v Thomas* was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thakerton (but in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion).
>
> In *Tay Kheng Hong v Heap Moh Steamship Co Ltd*, the Singapore Court of Appeal found there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. It

held that the trial judge was wrong in accepting the appellant's evidence. On appeal, the Privy Council held that the Court of Appeal's acceptance of the witness's evidence depended on inferences from documents. However, these inferences were insufficient material to entitle them to reject the result arrived at by the trial judge.

In the present case, it is apparent to us that the learned judge based her findings after considering the evidence of the witnesses and the documents and clearly her conclusions were based on inferences drawn from them. In our view, the learned judge did not make any specific finding of fact based on the evidence of PW3 and DW3 and the documents. Although she accepted the evidence of PW3 and DW3 as the most telling, there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them. At any rate, we will also show that her acceptance of their evidence was wrong. As for the second issue, her conclusion depended entirely on inferences drawn from the three agreements; AB22, 26 and 29. Since the present case does not involve the question of credibility of the witnesses, we are satisfied, following *Benmax* principle, that we are in as good a position to review and evaluate the evidence of the case as the trial judge.

[187] This court also expressed the same sentiments in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at pp 398–399:

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[188] The misdirection by the learned JC compelled us to intervene, to right the wrong and we will do so accordingly.

SECRET MEETINGS AND ILLEGAL GRATIFICATION SOLICITED BY ONE OF THE LIQUIDATORS

[189] We were told that this is the first case of its kind involving an open public tender exercise conducted by the liquidators of a company in liquidation where the liquidators had allegedly acted in breach of fiduciary duties, conflict of interest and acted fraudulently with Can-One International — the successful bidder.

[190] We were also told that this is the first case of its kind where one of the liquidators in the process of conducting an open public tender process for the

sale of the KJCFB shares in liquidation had had allegedly, secret and clandestine meetings with the representative of a bidder. It was not unlike a cloak and dagger affair, so to speak.

[191] Allegedly, one of the liquidators by the name of Ooi Woon Chee had two secret and private clandestine meetings with Jason See, a representative of Gold Pomelo, one out of the three bidders. The first meeting did take place and admitted by Ooi Woon Chee at the Devi's restaurant at Taman Tun Dr Ismail on 24 January 2009, a Saturday at about 7.30pm between Jason See and Ooi Woon Chee (one of the liquidators and cited as the first respondent).

[192] The second meeting took place on 2 February 2009 which was a public holiday in Kuala Lumpur at 9am at McDonald's located at One Utama.

[193] The learned JC decided in favour of Ooi Woon Chee — the first respondent liquidator, on the question of him soliciting the illegal gratification based on assumptions and inferences.

[194] It is accepted that liquidators are officers of the court and they are considered representatives of the court and they are entrusted with the reputation of the court for the impartial and proper despatch of duties. The standards expected from the liquidators are the same as that of the court or for that matter of a judge. The liquidators' duties are fiduciary in nature. All these are succinctly set out by Marks J in*Re Timberland Ltd (in liq) and Equitable Forestry Services Pty Ltd (in liq)* (1979) 4 ACLR 259; *Commissioner for Corporate Affairs v Peter William Harvey* [1980] VR 669 at p 286 (ACLR):

> The liquidator's fiduciary role as an officer of the court
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> An official liquidator is an officer of the court (r 74(1) of the Companies Act Rules).
>
> In a compulsory winding up his office stems from appointment by the court. He is clearly not an employee of the court but the nature of the appointment makes him a representative of it. As Street J said in *Duffy v Super Centre Development Corporation Ltd* [1967] 1 NSWR 382 at p 383 the decisions the liquidator makes from time to time are in effect made under the authority of the court itself. The winding up is by the court which for the purposes the liquidator is. As such he is entrusted with the reputation of the court for impartial and proper despatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge.
>
> When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the court.
>
> The law in the circumstances regards such duties as fiduciary although clearly it will not interfere with bona fide exercise of discretions which are not beyond the acts or omissions of a reasonable man (*Leon v York-O-Matic* [1966] 1 WLR 1450 at p 1454;

Re Teller Home Furnishers Pty Ltd (in liq) [1967] VR 313; *Re Mineral Securities (Aust) Ltd (in liq) and The Companies Act* [1973] 2 NSWLR 207). A

[195] The learned JC ruled in favour of Ooi Woon Chee in not soliciting gratification and she gave the following reasons: B

(a) that Ooi Woon Chee's version of the events, namely, that at the first meeting he was given a letter and that at the second meeting he was verbally informed of Gold Pomelo's intention to make an increased offer, is said to be supported by documents which are consonant with the progress of the tender and according to the learned JC it lends weight to his statements on oath (see the judgment of the learned JC at p 243A of the appeal record at Vol A4); C

(b) that notwithstanding such an outrageous and shocking overture by Ooi Woon Chee, not once, but twice, Jason See as well as the second respondent liquidator by the name of Ng Kim Tuck did not see fit to react proportionally to such a serious complaint, whether formally or otherwise, and instead, went on to meet Ooi Woon Chee for the second time and significantly made a revised offer (see the judgment of the learned JC at p 243A of the appeal record at Vol A4); D E

(c) that no complaint of improper conduct and fraud was made until about one month later on 2 March 2009 and 3 March 2009 after Can-One International had been awarded the sale of the KJCFB shares (see the judgment of the learned JC at p 244A of the appeal record at Vol A4); F

(d) that it defies logic why the liquidator Ooi Woon Chee would ask for a bribe at both meetings on 24 January 2009 and 2 February 2009 in order that Ooi Woon Chee could award the contract to Gold Pomelo at the lesser price of RM1.50 to RM1.58 when Can-One International's bid of RM1.65 per share had already been received on 19 January 2009 and that the liquidators had on 23 January 2009 already advised Gold Pomelo that the contract would be awarded to them if they made a bid for the sum of RM1.68 (see the judgment of the learned JC at p 244A of the appeal record at Vol A4); G H

(e) that Jason See's first affidavit did not even provide an accurate and complete account of events at these meetings and no mention was made of his letter dated 24 January 2009 which he handed to Ooi Woon Chee nor the fact that he communicated Gold Pomelo's intention to revise its offer upwards on 2 February 2009 nor was there any mention of the quantum sought for the illegal gratification (see the judgment of the learned JC at p 244A of the appeal record at Vol A4); and I

(f) that the allegation has no basis in that the alleged corrupt acts have not resulted in any pecuniary loss to the company and that, on the contrary, there might well have been a cause for complaint if the contract had been awarded to Gold Pomelo with a resultant loss of some RM19m (see the judgment of the learned JC at p 245A of the appeal record at Vol A4).

[196] Ooi Woon Chee held two private and secret meetings outside the office in connection with the bid, not unlike a judge meeting lawyers or clients outside the context of a court.

[197] As officers of the court, the liquidators are not above the law and must uphold the integrity and sanctity and transparency of the open public tender exercise which is a judicial sale. The judicial sale must be seen to be impartial and above board. Serious questions have been raised which must be investigated and answered.

CONCLUSION

[198] The case to nullify the sale of the KJCFB shares to Can-One International is not based on a gross exaggeration of the affidavit evidence. On the contrary, it is based on hard solid affidavit evidence.

[199] For the reasons adumbrated above, we hereby make an order that the directions of the learned JC are appealable. And we also allow these appeals with costs. In particular, we specifically:

(a) set aside, unless expressly excluded, all orders of the learned JC;

(b) grant leave to the appellants/applicants in encl 476 to proceed with legal action against the liquidators;

(c) pursuant to order (b), dismiss the application (encl 497) by the minority contributories to strike out encl 476 and dismiss the motion (encl 493) by Can-One International to oppose encl 476;

(d) dismiss the motion (encl 85) by the liquidators for leave/directions to proceed with the completion of sale of the KJCFB shares to Can-One International;

(e) dismiss the motion (encl 500) by Can-One International to direct the liquidators to proceed with the sale of the KJCFB shares to Can-One International;

(f) affirm the order granting leave to Can-One International to intervene in encl 476;

(g) allow the motion (encl 506) by Gold Pomelo to intervene in encl 485, but dismiss the motion (encl 506) by Gold Pomelo for prayers 2, 3, 4, 5, 6, 7 and 8; and

(h) award the following sums as costs in these appeals:

(i) to the appellants, the sum of RM40,000 to be paid by the liquidators/applicants in encl 476;

(ii) to the appellants, the sum of RM20,000 to be paid by the liquidators/applicants in encl 485;

(iii) to the appellants, the sum of RM15,000 to be paid by the minority contributories/applicants in encl 497;

(iv) to the appellants, the sum of RM15,000 to be paid by the Can-One International/applicant in encl 493; and

(v) to the appellants, the sum of RM15,000 to be paid by Can-One International/applicant in encl 500.

[200] We conclude with the following direction, that all further actions/motions/applications that flow from this decision, to be heard by another High Court judge.

[201] My learned brother Jeffrey Tan Kok Wha JCA has expressed his concurrence with this judgment. The other panel member, Tee Ah Sing JCA has since retired.

Appeal allowed with costs.

Reported by Kohila Nesan